

No. 12727 2666

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA STATE BOARD OF
EQUALIZATION,

Appellant.

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of West Coast Cabinet Works, Inc.,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12727

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA STATE BOARD OF
EQUALIZATION,

Appellant.

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of West Coast Cabinet Works, Inc.,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Petition for Order to Show Cause..	5
Clerk's Certificate	106
Findings of Fact and Conclusions of Law....	43
Hearing on Order to Show Cause on Petition of Trustee on Members of the State Board of Equalization	49
Exhibit A—List of Items.....	64
Injunction	8
Names and Addresses of Attorneys.....	1
Objections to Proposed Findings.....	35
Order Re Amendment of Referee's Certificate.	24
Order Denying Petition to Review.....	48
Order Granting Petition for Allowance of Ap- peal	107
Order to Show Cause.....	3
Petition for Leave to Appeal Under Section 24(a) of the Bankruptcy Act.....	108
Petition of State Board of Equalization for Review of Referee's Order by Judge.....	11
Exhibit A—Injunction	17

	INDEX	PAGE
Proposed Findings Pursuant to Objections Heretofore Filed		38
Referee's Certificate on Review.....		20
Statement of Points Upon Which Appellant Intends to Rely.....		116
Stipulation		4
Stipulation		24
Exhibits, Board's:		
Ex. No. 1—Office Correspondence Re Ruling 79—Final Returns —New Permits		
		30
2—Letter Dated August 11, 1943		
		32
3—Letter Dated December 6, 1934		
		33
Witnesses, Board's:		
Campbell, John J.		
—direct		
		67
Goggin, George T.		
—direct		
		91
—cross		
		103
—redirect		
		104
Kingman, Ivan F.		
—direct		
		55
Trezise, George E.		
—direct		
		90

NAMES AND ADDRESSES OF ATTORNEYS

LESLIE S. BOWDEN, ESQ.,
548 South Spring Street,
Los Angeles, California,
For Trustee.

FRED N. HOWSER, ESQ.,
Attorney General,
600 State Building,
Los Angeles, California ;

JAMES E. SABINE, ESQ.,

DANIEL N. STEVENS, ESQ.,
Deputy Attorney General,
For State of California.

CRAIG, WELLER & LAUGHARN,
Suite 817, 111 West Seventh Street,
Los Angeles 14, California ;

HUBERT F. LAUGHARN, ESQ.,

THOMAS TOBIN, ESQ.,
As Amici Curiae.

In the District Court of the United States, Southern
District of California, Central Division
In Bankruptcy No. 44,249 W

In the Matter of

WEST COAST CABINET WORKS, INC.,

Bankrupt.

ORDER TO SHOW CAUSE

Upon reading and filing the verified Petition of the Trustee herein, and good cause appearing therefor;

It Is Hereby Ordered: That Wm. G. Bonelli, George R. Reilly, Jas. H. Quinn, Thos. Kuchel, and Richard E. Collins, members of the State Board of Equalization of the State of California, be and appear before the undersigned Referee, Room 343, Federal Building, Los Angeles, California, on the 24th day of October, 1946, at the hour of ten a.m. thereof, or as soon thereafter as counsel may be heard, then and there to show cause if any they have why a permanent Injunction should not be issued against them enjoining and restraining them and each of them from enforcing any of the provisions of the California State Sales Tax against the Trustee herein.

It Is Further Ordered that service of this Order may be made by depositing a copy of same in the United States Post Office, postage prepaid, and addressed to the following persons, to wit: [1*]

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Members of State Board of Equalization:

Wm. G. Bonelli, Los Angeles, California.

George R. Reilly, San Francisco, California.

James H. Quinn, Oakland, California.

Thomas Kuchel, Sacramento, California.

Richard E. Collins, Redding, California.

Secretary of the Board, Dixwell L. Pierce, Sacramento, California.

It Is Further Ordered that said service shall be made at least ten days before the hearing of this Order to Show Cause.

Dated at Los Angeles, California, October 3, 1946.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed [2]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the Trustee, and the State Board of Equalization of the State of California, through their respective counsel, that an Amended Petition may be filed herein in support of the Trustee's Order to Show Cause heretofore issued out of the above-entitled court, and directed against the State Board of Equalization of the State of California.

Dated: Los Angeles, California, this 31st day of November, 1946.

/s/ LESLIE S. BOWDEN,
Attorney for Trustee.

ROBT. W. KENNY,
Attorney General,

By /s/ DANIEL N. STEVENS,
Deputy Attorney General, Attorney for State Board
of Equalization. [3]

It Is So Ordered.

Dated: Los Angeles, California, this 31st day of November, 1946.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed [4]



[Title of District Court and Cause.]

AMENDED PETITION FOR
ORDER TO SHOW CAUSE

The petition of George T. Goggin, respectfully shows:

I.

That he is the duly appointed, acting and qualified Trustee in bankruptcy of the above-entitled bankrupt estate.

II.

That the automobile trucks hereinafter mentioned were not sold by the Trustee herein in conducting the business of the bankrupt estate.

III.

That during the course of the administration of this bankrupt estate, and in liquidating the assets belonging to said bankrupt estate, your petitioner sold in open court certain automobile trucks and received therefor the total sum of Ten Thousand Eight Hundred Seventy-five (\$10,875.00) Dollars.

IV.

That subsequent to said sale the State Board of Equalization of the State of California, on September 11, 1946, notified your petitioner that he had become indebted to them in the sum of \$276.24, under the provisions of the California State Sales Tax Act, and further that your petitioner is liable for all of the penalties provided by the said California State Sales Tax Act, and particularly for a penalty of 10% of the tax for not making a return of said sales to said State Board of Equalization.

V.

That your petitioner is informed and believes and therefore alleges that in connection with the sales referred to in paragraph III of this petition he is not liable nor required, nor is the bankrupt estate liable or required to comply with any of the provisions of the California State Sales Tax Act, or the rules and regulations of the State Board of Equali-

zation of the State of California in connection therewith.

VI.

That unless an Injunction is issued out of this Court directed against said State Board of Equalization enjoining them from attempting to collect the Sales Tax herein referred to your petitioner is informed and believes and therefore alleges that said State Board of Equalization will continue to assess penalties against your petitioner, and will endeavor to enforce all of the penal provisions against your petitioner as are provided in said California State Sales Tax Act, unless your petitioner complies with the provisions contained therein.

Wherefore your petitioner prays:

That an Order to Show Cause issue out of the above-entitled court directing said State Board of Equalization to appear at a time and place certain to show cause if any they have why they should not be permanently restrained and enjoined [6] from attempting to enforce any of the provisions of the California State Sales Tax Act, or the State Board of Equalization rules and regulations against your petitioner in connection with the sales herein referred to, and for such other and further relief as may be just and equitable in the premises.

/s/ GEO. T. GOGGIN,

Petitioner. [7]

State of California,
County of Los Angeles—ss.

George T. Goggin, being by me first duly sworn, deposes and says: That he is the petitioner in the above-entitled action; that he has read the foregoing Amended Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

/s/ GEO. T. GOGGIN.

Subscribed and Sworn to before me this 31st day of October, 1946.

[Seal] /s/ N. E. NAISH,
Notary Public in and for
Said County and State.

[Title of District Court and Cause.]

INJUNCTION

This matter having come on regularly to be heard before the undersigned Referee, on the 14th day of November, at the hour of 10 a.m. thereof, upon the amended petition of the Trustee, Leslie S. Bowden, appearing on behalf of the Trustee, Daniel N. Stevens, Deputy Attorney General, of the State of California, appearing for the Respondents, and evidence both oral and documentary having been introduced on behalf of the parties, and after hearing the arguments of counsel, and being fully ad-

vised in the premises, and the matter having been submitted for decision, I find:

I.

That George T. Goggin is the duly elected, acting and qualified Trustee in Bankruptcy of the above-named bankrupt.

II.

That the Trustee herein, for a limited period of time in connection with the administration of this bankrupt estate conducted the business of said bankrupt, and in the course of [9] the conduct of said business paid to the Respondents herein, all California State Sales Tax required to be paid by him in accordance with the laws of the State of California.

III.

That in liquidating the assets of this estate, the Trustee sold in open court to the highest bidders, a portion of the assets of this estate consisting of automobile trucks, and received therefor the total purchase price of Ten Thousand Eight Hundred Seventy-five (\$10,875.00) Dollars. That said sales were duly confirmed by an order of this court. That said automobile trucks were not sold by the Trustee herein in the course of conducting the business of the bankrupt estate.

IV.

That subsequent to the sales of said automobile trucks the Respondents herein notified the Trustee that he had become indebted to them on account of said sales in the sum of Two Hundred Seventy-six

and 24/100 (\$276.24) Dollars, for California Sales Tax, calculated by them under the provisions of the California Sales Tax Act. That the Trustee refused to pay the same.

V.

That the Respondents herein have filed no claim in this proceeding for said alleged sales tax, and are attempting to enforce the payment of said Sales Tax as against the Trustee herein.

VI.

That the Trustee is not required to pay to the Respondents herein Sales Tax on said automobile truck sales, for the reason that the said sales were made by the Court in the normal administration of this estate in liquidating the assets for the benefit of the creditors.

VII.

That by reason of the facts, the Trustee has no plain, speedy and adequate remedy at law. [10]

It Is Therefore Ordered that the Respondents herein and each of them be and they are hereby permanently restrained and enjoined from attempting in any manner whatsoever, from enforcing as against the Trustee herein or this bankrupt estate herein, the payment of said sum of Two Hundred Seventy-six and 24/100 (\$276.24), or from enforcing or attempting to enforce as against the Trustee

herein or this bankrupt estate, any of the provisions of the California State Sales Tax in connection with the sales herein referred to.

Dated: Los Angeles, California, this 9th day of December, 1946.

/s/ HUGH L. DICKSON,
Referee.

[Endorsed]: Filed Dec. 2, 1946. [11]

[Title of District Court and Cause.]

PETITION OF STATE BOARD OF EQUALI-
ZATION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Your petitioner, State Board of Equalization of the State of California, by and through the Attorney General of the State of California, respectfully represents as follows:

I.

On October 3, 1946, the above-designated Referee in Bankruptcy, upon the verified petition of George T. Goggin, Trustee in Bankruptcy of the above-entitled bankrupt estate, made and entered an order directing said State Board of Equalization of the State of California to appear before said Referee on the 24th day of October, 1946, and to show cause,

if any exists, why it should not be permanently enjoined from attempting to enforce any of the provisions of the California Sales and Use Tax Law against said Trustee or to collect a retail sales tax measured by the gross receipts of said Trustee from the sale by him of certain automobile trucks [12] which were assets of said bankrupt estate.

II.

After being continued from October 24, 1946, to October 31, 1946, hearing was had upon said order to show cause on the latter date and on November 14, 1946, at which time evidence, both oral and documentary, was introduced and certain facts were stipulated in open court, and the matter was taken under submission.

III.

On the 9th day of December, 1946, a final order was made and entered by the said Referee decreeing that there is no liability for sales tax under the California Sales and Use Tax Law due from said Trustee in Bankruptcy arising from the sale by said Trustee on March 29, 1946, of five trucks owned by said bankrupt and enjoining the State Board of Equalization of the State of California from attempting to collect said tax from said Trustee; a copy of said order is attached, marked "Exhibit A," and made a part hereof by reference.

Assignments of Error

Said order is erroneous for the following reasons:

1. The court erred in rejecting evidence offered

on behalf of your petitioner, to wit: Evidence of the number and character of the sales made by said Trustee during the period beginning March 12, 1946, to and including May 14, 1946.

The rejection of such evidence constitutes error because it is necessary to consider all of the sales made by the Trustee in order to determine whether he is a "retailer" subject to the retail sales tax imposed by the California Sales and Use Tax Law.

2. The court erred in making and entering its finding number II, as follows, to wit:

"II

"That the Trustee herein, for a limited period of time in connection with the administration of this bankrupt estate conducted the business of said bankrupt, and in the course of the conduct of said business paid to the Respondents herein, all California State Sales Tax required to be paid by him in accordance with the laws of the State of California."

because, for the reasons hereinafter specified in your petitioner's Assignment of Error, said Trustee owes the State of California sales tax, together with accumulated interest as provided by law, measured by the gross receipts from his sales on March 29, 1946, of five trucks used in the bankrupt's business of selling tangible personal property at retail in California.

3. The court erred in making and entering its finding numbered III, as follows, to wit:

“III.

“That in liquidating the assets of this estate, the Trustee sold in open court to the highest bidders, a portion of the assets of this estate consisting of automobile trucks, and received therefor the total purchase price of Ten Thousand Eight Hundred Seventy-five (\$10,875.00) Dollars. That said sales were duly confirmed by an order of this court. That said automobile trucks were not sold by the Trustee herein in the course of conducting the business of the bankrupt estate.”

for the reason that there was not sufficient competent [14] evidence to support or warrant said referee in “finding: That said automobile trucks were not sold by the Trustee herein in the course of conducting the business of the bankrupt estate.” On the contrary, the evidence offered by your petitioner shows that, in conducting the business of the bankrupt pursuant to court order, said Trustee sold both cabinets and the machinery and equipment used in the manufacture and sale of said cabinets, all of which were assets of said bankrupt’s estate.

4. The court erred in making and entering its finding numbered VI, as follows, to wit:

“VI.

“That the Trustee is not required to pay to the Respondents herein Sales Tax on said automobile truck sales, for the reason that the said sales were made by the Court in the normal

administration of this estate in liquidating the assets for the benefit of the creditors.”

for the following reasons, to wit:

(1) The evidence shows that said Trustee, in continuing the retail sales business of said bankrupt, was a “retailer,” as defined in the California Sales and Use Tax Law, and the gross receipts from his sales of equipment used in the business of selling tangible personal property at retail, including the five trucks sold on March 29, 1946, must be included within the measure of the tax (*Bigsby v. Johnson*, 18 Cal. 2d 860); and

(2) The evidence shows, or if admitted would show, that said Trustee’s sales were of such a [15] number, scope and character as to constitute said Trustee a “retailer,” as defined in the California Sales and Use Tax Law, and that his gross receipts from the sale of the five trucks used to deliver to vendees the bankrupt’s cabinets must be included within the measure of the tax. (*Northwestern Pacific Railroad Co. v. State Board of Equalization*, 21 Cal. 2d 524.)

5. The court erred in rejecting evidence offered on behalf of your petitioner, including documentary evidence marked Board’s Exhibit Nos. 1 and 3 for identification, of your petitioner’s administrative construction and application of the California Sales and Use Tax Law to sales of tangible personal property at retail by trustees in bankruptcy and other

individuals acting in a representative capacity, for the reason that the administrative construction of a statute by the agency authorized and required by law to apply the tax should be accorded great weight and should be followed by the courts unless clearly erroneous.

6. Said order is contrary to law for the reason that Congress has expressly provided by The Act of June 18, 1934 (28 U.S.C.A., Sec. 124a) that a trustee in bankruptcy who conducts any business shall be subject to all State taxes applicable to such business the same as if such business were conducted by an individual or corporation; the evidence shows that the Trustee of the above-entitled bankrupt estate conducted the business of a "retailer" within the purview of the California Sales and Use Tax Law, and said Trustee should be required to pay the tax imposed by that Act measured by his [16] gross receipts from the sales on March 29, 1946, of the five trucks belonging to the bankrupt's estate.

Wherefore, your petitioner prays for a review of said order by the Judge, and that said order be vacated and set aside, and for such other and further relief as the court deems just.

Dated: January 7, 1947.

STATE BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,
Petitioner.

By FRED N. HOWSER,
Attorney General,
State of California.

/s/ DANIEL N. STEVENS,
Deputy Attorney General.

Attorneys for State Board of Equalization, State of
California, Petitioner. [17]

EXHIBIT "A"

In the District Court of the United States, Southern
District of California, Central Division
In Bankruptcy No. 44,249 W

In the Matter of

WEST COAST CABINET WORKS, INC.,
Bankrupt.

INJUNCTION

This matter having come on regularly to be heard before the undersigned Referee, on the 14th day of November, at the hour of 10 a.m. thereof, upon the amended petition of the Trustee, Leslie S. Bowden, appearing on behalf of the Trustee, Daniel N. Stevens, Deputy Attorney General, of the State of California, appearing for the Respondents, and evidence both oral and documentary having been introduced on behalf of the parties, and after hearing the arguments of counsel, and being fully advised in the premises, and the matter having been submitted for decision, I find:

I.

That George T. Goggin, is the duly elected, acting and qualified Trustee in Bankruptcy of the above-named bankrupt.

II.

That the Trustee herein, for a limited period of time [18] in connection with the administration of this bankrupt estate conducted the business of said bankrupt, and in the course of the conduct of said business paid to the Respondents herein, all California State Sales Tax required to be paid by him in accordance with the laws of the State of California.

III.

That in liquidating the assets of this estate, the Trustee sold in open court to the highest bidders, a portion of the assets of this estate consisting of automobile trucks, and received therefor the total purchase price of Ten Thousand Eight Hundred Seventy-five (\$10,875.00) Dollars. That said sales were duly confirmed by an order of this court. That said automobile trucks were not sold by the Trustee herein in the course of conducting the business of the bankrupt estate.

IV.

That subsequent to the sales of said automobile trucks the Respondents herein notified the Trustee that he had become indebted to them on account of said sales in the sum of Two Hundred Seventy-six and 24/100 (\$276.24) Dollars, for California Sales Tax, calculated by them under the provisions of the California Sales Tax Act. That the Trustee refused to pay the same.

V.

That the Respondents herein have filed no claim

in this proceeding for said alleged sales tax, and are attempting to enforce the payment of said Sales Tax as against the Trustee herein.

VI.

That the Trustee is not required to pay to the Respondents herein Sales Tax on said automobile truck sales, for the [19] reason that the said sales were made by the Court in the normal administration of this estate in liquidating the assets for the benefit of the creditors.

VII.

That by reason of the facts, the Trustee has no plain, speedy and adequate remedy at law.

It Is Therefore Ordered that the Respondents herein and each of them be and they are hereby permanently restrained and enjoined from attempting in any manner whatsoever, from enforcing as against the Trustee herein or this bankrupt estate herein the payment of said sum of Two Hundred Seventy-six and 24/100 (\$276.24), or from enforcing or attempting to enforce as against the Trustee herein or this bankrupt estate, any of the provisions of the California State Sales Tax in connection with the sales herein referred to.

Dated: Los Angeles, California, this 9th day of December, 1946.

HUGH L. DICKSON,
Referee. [20]

State of California,
County of Los Angeles—ss.

Daniel N. Stevens, Deputy Attorney General, being by me first duly sworn, deposes and says: That he is one of the attorneys for petitioner in the above-entitled matter; that he has heard read the foregoing Petition for Review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, that he believes it to be true.

/s/ DANIEL N. STEVENS.

Subscribed and sworn to before me this 7th day of January, 1947.

[Seal] /s/ KATHRYN BUCKMAN,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 7, 1947. [22]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE
ON REVIEW

To the Honorable Jacob Weinberger, Judge of the United States District Court, Southern District of California, Central Division.

I, Hugh L. Dickson, Referee in Bankruptcy in the above-entitled matter do hereby certify:

That George T. Goggin, the Trustee herein, filed his petition for Order to Show Cause against Wm. G. Bonelli, George R. Reilly, Jas. H. Quinn, Thos. Kuchel, and Richard E. Collins, members of the State Board of Equalization of the State of California, to show cause why the State Board of Equalization should not be permanently enjoined from attempting to enforce any of the provisions of the State Sales Tax Act of the State of California against said Trustee or collect the tax referred to in said Trustee's petition.

On the 31st day of October, 1946, at the hour of 10:00 a.m. at the date of hearing of said petition, Leslie S. Bowden appeared as Attorney for the Trustee, and Robert W. Kenny, Attorney General of the State of California, Daniel E. Stevens, Deputy Attorney General, appeared for the State Board [23] of Equalization. Upon stipulation being made in open court, the Trustee was granted leave to file his amended petition. The hearing on the petition was not completed on the 31st day of October, 1946, and was regularly continued and concluded on the 14th day of November, 1946.

The question presented for determination was as follows:

“Is a Trustee in Bankruptcy Liable for the California State Sales Tax on Sales Made in Liquidation and not in the Conduct of the Business.”

The Trustee contended that he was not liable as Trustee in Bankruptcy for the payment of taxes of the California State Sales Tax where property he had sold was not sold in the conduct of the business of the bankrupt, but was sold in liquidation sales.

It was the contention of the State Board of Equalization that the Trustee in Bankruptcy was liable for the payment of all taxes under said Act computed on the amount of sales of all property sold by him in this proceeding.

The facts generally were stipulated to as follows:

That the West Coast Cabinet Works, Inc., was engaged in the business of selling tangible personal property at retail in the State of California, that the Receiver, George T. Goggin, conducted the business for a limited period of time and completed certain orders which had been started by the bankrupt, and paid the state sales tax on the articles so completed. Upon being elected Trustee, he also conducted the business for a limited period of time and completed certain orders which the bankrupt had started and paid the state sales tax on the articles so completed, That as Trustee and liquidating the asset of the bankrupt he sold five (5) [24] trucks which the bankrupt had used in the operation of its business, and on said sales the State Board of Equalization made a determination against said Trustee and assessed said Trustee the sum of Two Hundred Sixty Eight and 20/100 (\$268.20) Dollars. The amount claimed by it as the California State Sales Tax accruing on the sale of said trucks.

Upon considering the evidence, I found that the position of the Trustee was correct and thereupon on the 9th day of December, 1946, issued a permanent injunction restraining and enjoining said State Board of Equalization from enforcing or attempting to enforce as against the Trustee herein, or the Bankrupt Estate, any of the provisions of the Cali-

ifornia State Sales Tax Act in connection with sales made in liquidation and not made in operating the business of the bankrupt. A copy of said injunction was served upon and approved as to form by the Attorneys for the State Board of Equalization as is shown in said order on file herein.

Thereafter and on the 7th day of January, 1947, the State Board of Equalization filed their petition for review of said order by the Judge.

Attached to this certificate are the following documents:

1. The petition of the State Board of Equalization for Review of Referee's Order by Judge.
2. The amended Petition for Order to Show Cause of the Trustee herein.
3. The Order to Show Cause issued by the Court on said Petition.
4. The Injunction issued on said Amended Petition on the 9th day of December, 1946, which contains proof of service thereof. [25]
5. The Reporter's Transcript of the evidence taken in the proceeding.
6. Order Extending Time to File Petition for Review.
7. Objections to Proposed Findings of Fact by State Board of Equalization.

Dated: Los Angeles, California, this 14th day of February, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 19, 1947. [26]

[Title of District Court and Cause.]

ORDER RE AMENDMENT OF
REFEREE'S CERTIFICATE

For the purpose of facilitating this Court's consideration of issues before it on the Petition of the State Board of Equalization to Review Referee's Order, and to avoid the delay incident upon the taking of further testimony before the Referee,

It Is Ordered that the testimony and exhibits mentioned in the stipulation of counsel attached hereto be considered a part of the Referee's Certificate to the same effect as if originally certified by the Referee on February 14, 1947.

Dated: February 14, 1949.

/s/ JACOB W. WEINBERGER,
Judge U. S. District Court.

—

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between counsel for the Trustee herein and counsel appearing on behalf of the California State Board of Equalization that at the hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, on the order directing said State Board of Equalization to show cause why it should not permanently be enjoined from attempting to enforce any of the provisions of the California Sales and Use Tax Law against the Trustee

herein or to collect a Retail Sales Tax measured by the gross receipts of the Trustee from the sale by him of certain automobile trucks which were assets of the bankruptcy estate, one John J. Campbell was called to the stand as a witness on behalf of the said Board of Equalization; that said witness testified that he occupied the position of State Sales Tax Administrator, as shown by the transcript of said hearing at page 20 thereof; that from said transcript it appears that counsel for the Board of Equalization made offers of proof as follows: [28]

“Mr. Stevens: I will offer to prove by this witness if he were permitted to answer that question that he would testify the District Tax Administrators and the auditing staffs of the State Board of Equalization have been instructed to apply the sales and use tax law to a Trustee in Bankruptcy under either of two situations.

“If the auditor in making his audits finds that the Trustee has continued the business of the bankrupt retailer and subsequently has sold the retailer’s merchandise and equipment in liquidation of the bankrupt’s estate, the tax is applied under those circumstances to all sales whether sales of stock, goods, or of equipment used in the retail business.

“Under the other theory the auditing staff is instructed that the Trustee’s sale of tangible personal property in liquidation of the bankrupt’s estate must be examined to see whether they are of a character and number to constitute the Trustee a retailer within the purview of the sales and use tax law.

“In this connection the auditing staff is further instructed that if two or more sales are made in any taxable period the Trustee is to be considered a retailer within the meaning of the sales and use tax law and that if such sales are sales at retail which are sales to an ultimate consumer or for any other purpose other than resale, the Trustee is to be assessed a tax measured by the gross receipts from such sales.

“I will offer to prove by this witness that the instructions which have been adopted and the administrative practice which has been employed by the Board since the effective date of the California Retail Sales Act is to [29] regard the sales tax as applicable to gross receipts from sales of tangible personal property made by administrators and executors of probate estates in connection with the liquidation of the estates of decedents and by trustees and receivers in State courts as well as in the Federal Court, assignees for the benefit of creditors, State liquidators, such as the Building and Loan Commissioner of the State of California when that officer takes over a corporation for the purpose of liquidation and makes sales of tangible personal property, the State Superintendent of Banks when the State Superintendent takes over a banking institution and makes sales of the tangible personal property belonging to the bank. Another example would be when the Insurance Commissioner takes over an insurance company for the purpose of liquidation and sells tangible personal property within the State of California as well as other fiduciaries

in connection with the liquidation of property in insolvency proceedings.

“I will offer to prove by this witness that when the entire tangible personal property of the estate is disposed of in one or two sales and the estate does not otherwise sell tangible personal property the Board’s administrative practice is and has been to regard such a sale as not within the taxing province of the law for the reason that the making of one or two sales of tangible personal property is not regarded as constituting the seller a retailer as defined under Section 2(E) of the Retail Sales Act of the State of California and Section 6015 of the Revenue and Taxation Code of the State of California. It is the administrative practice where tangible personal property is disposed of by retail sales in series of more [30] than two transactions that the seller, whether he be executor, administrator, trustee, or other representative, is regarded as a retailer to the same extent as would be an individual or firm disposing of his or its own property.”

(Tr. p. 24, line 20—p. 27, line 7.)

“Q. (By Mr. Stevens): How are your administrative instructions, Mr. Campbell, applicable to the facts in this case?”

* * *

“Mr. Stevens: I will offer to prove by this witness in answer to that question he would testify that under either of the two theories previously mentioned in the offer of proof made in response to the question ‘What are those instructions?’ that in this

case the auditor finds that forty-four sales of tangible personal property have been made by the Trustee in bankruptcy; that thirty-two of such sales are retail sales, or in other words, sales to ultimate consumers or for purposes other than resale; that twelve of such sales are sales for resale and that nine of the forty-four sales are of cabinets or cupboards which were manufactured in the course of the Bankrupt's business; that under the first theory the auditor finds that the Trustee has applied for a sales tax permit to engage in the sale of tangible personal property in the State of California and that pursuant to that seller's permit the Trustee has made a number of sales of the stock in goods of the bankrupt retailer. Consequently, under the first theory, when the auditor finds that sales were made of equipment and machinery used in connection with the operation of the bankrupt's retail business the auditor applies the tax to the sale of such equipment and machinery. Under the second theory the [31] administrative instruction would be applicable because of the fact that forty-four sales were made during the period which the Trustee held a seller's permit issued by the State Board of Equalization and that thirty-two retail sales made are sufficient in number, scope, and character to constitute the Trustee a seller within the meaning of the Sales Tax Law."

(Rep. Tr. p. 32, lines 7-8; p. 32, line 15—p. 33, line 17.)

It Is Stipulated by counsel that the aforesaid wit-

ness may be deemed to have testified in accordance with and as set forth in said offers of proof.

It Is Further Stipulated that the exhibits admitted for identification and numbered Board's Exhibits 1, 2 and 3 may be deemed to have been admitted in evidence at said hearing as the Board's Exhibits 1, 2 and 3.

It Is Further Stipulated that the witness Ivan Kingman called on behalf of the California State Board of Equalization may be deemed to have testified in accordance with and as set forth in the offer of proof contained in the exhibit set forth on pages 17, 17a, 18 and 18a of the Transcript of said hearing.

Dated: February 9th, 1949.

/s/ LESLIE S. BOWDEN,
Attorney for Trustee.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for State
Board of Equalization.

It Is So Ordered.

It Is Further Ordered that the Referee's Certificate may be amended to include this stipulation and order.

/s/ HUGH L. DICKSON,
Referee. [32]

BOARD'S EXHIBIT No. 1

State Board of Equalization

Office Correspondence

Place: Sacramento, California

Date: June 10, 1941

To: Headquarters & Field Staff, Sales Tax Division

From: T. H. Mugford

Re: Ruling 79—Final Returns—New Permits

The following procedure will be used in the situations mentioned in Ruling No. 79:

1-a. Death of an Individual Proprietor and Liquidation of His Business:

A final return is not required within fifteen days of the death of the proprietor but is required within fifteen days of the quitting of business; i.e., completion of sales in the liquidation process by the decedent's representative. A form 406 and new permit are not required if the decedent's representative is liquidating the business over a relatively short period and is not continuing the business

1-b. Death of an Individual Proprietor and Operation of His Business Continued by His Representative:

A final return is not required within fifteen days of the death of the proprietor in such

cases. Form 406 and new permit, however, are required so that the old permit in the name of the decedent will be closed out and a new permit will be issued in the name of the representative for the estate of the decedent.

The principal test by which to distinguish situation 1-a from 1-b is whether, (1-a) the representative is merely selling out the equipment and stock of goods of the decedent during a short period in the process of liquidation, or (1-b) he is continuing to operate the business, making additional purchases of merchandise, holding out that the business is a going concern, etc.

In both 1-a and 1-b, if a claim in probate is to be filed, it is necessary to show in an audit report the liability accrued prior to the death of the proprietor separately from the liability accrued thereafter.

2. Changes of Ownership Without Quitting of Business:

In situations number 2, 3 and 4 in ruling 79 where there is a change in the personnel of the partnership but not a quitting [33] of business, there is no requirement that a return be made within fifteen days from date of the change in the partnership. A form 406 to close out the old partnership and a new permit for the new partnership are required as of the date of the change in the partnership.

3. Returns Without Penalty-Accounts:

In each of the four situations mentioned in ruling 79, a return filed within the required time

for the month or quarter, as the case may be, during which the death or change in the personnel of the partnership occurred will be accepted without penalty. Such returns if they are full-paid will not be "split" between the periods before and after the change until or unless a claim, assessment or refund involving both periods is to be made.

4. Assessments and Refunds:

If in any of these four situations mentioned, an assessment or a refund is to be made for periods both prior and subsequent to the death or change in partnership, audit reports, assessment notices and refund claims must segregate the liability or over-payment between the two periods.

/s/ J.H.M.

THM:TW [34]

BOARD'S EXHIBIT No. 2

August 11, 1943

Leib & Leib

First National Bank Building

San Jose 15, California

Gentlemen:

We acknowledge your letter of August 7, with further reference to a proposed sale by the Executrix of the Estate of a deceased person of two cases and two bottles of whiskey which are a part of the Estate.

In so far as the provisions of the California Retail Sales and Use Tax Law are concerned, no tax would be due nor would any return be required if a single sale were made of all of the tangible personal property of the Estate. However, if the property were to be sold piecemeal, a number of separate sales being made, a seller's permit and return and payment of sales tax would be required.

We are referring your letter of August 7th to the Alcoholic Beverage Control Division should any question arise, in view of that division's letter to you of July 27th, concerning a possible violation of the provisions of the Alcoholic Beverage Control Act.

Very truly yours,

ASSOCIATE TAX COUNSEL.

EHS:BW [35]

BOARD'S EXHIBIT No. 3

Sales by Administrator or Executor

Sacramento, California

December 6, 1934

Hahn & Hahn,

Suite 808 Pacific Southwest Bldg.

Pasadena, California

Gentlemen:

We have your inquiry of December 3rd as to the applicability of sales tax to receipts from oriental rugs exchanged with creditors for cancellation of indebtedness to them.

Section 2b of the California Retail Sales Tax Act defines "sale" as "any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration."

Accordingly, where your client, the administrator of the estate of H. D. Philibosian, exchanged oriental rugs with the creditors of the estate, the transaction was a sale, within the meaning of the Act.

The administrator succeeding to the business of the decedent is engaged in business within the meaning of the Act, and accordingly the transactions in question cannot be held to be isolated or occasional sales not subject to tax.

The sales tax should be paid on the amount of indebtedness cancelled as a consideration for the exchange of the rugs, as such is the true consideration for the sale.

We enclose a copy of the Sales Tax Act and call your attention to Section 14 thereof, to the effect that a permit is not assignable and shall be valid only for the person in whose name it is issued.

If it is the intention of your client to promptly liquidate the business, we will permit liquidation and reporting of the tax under the old permit number, but if the business is to be operated for any considerable length of time a new permit must be obtained.

We have issued sales tax rulings in loose leaf form, but we believe that reference to the provisions

of the Sales Tax Act above noted will suffice for your purpose.

Very truly yours,

R.W.B.,

Asst. Sales Tax Counsel.

RWB/L

[Endorsed]: Filed Feb. 14, 1949. [36]

OPINION

[The Opinion of Judge Weinberger, filed August 7, 1950, is reported in 92 Fed. Supp. 636.]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS

Comes Now the California State Board of Equalization, by and through its counsel, Fred N. Howser, Attorney General of the State of California, and James E. Sabine and Edward Sumner, Deputy Attorneys General, and makes formal objection to the proposed findings prepared by counsel for the Trustee in Bankruptcy herein on the ground that the findings are incomplete in the following respects:

1. The findings do not disclose that the instant bankruptcy proceeding was initiated by the filing of the petition under Chapter XI on February 5, 1946, nor that adjudication thereafter occurred on March 12, 1946.

2. The findings are incomplete in that they fail to disclose that George T. Goggin acted as Receiver during the pendency of Chapter XI proceedings from February 5, 1946, to March 11, 1946, and that upon adjudication on March 12, 1946, Mr. Goggin continued as the duly authorized Trustee in Bankruptcy of the within estate.

3. The findings fail to disclose that George [127] T. Goggin, as Receiver during Chapter XI proceedings applied for and obtained a Sales Tax permit under the California Sales and Use Tax Law and that he filed returns and paid the tax due under said Law for said period.

4. The findings fail to disclose that upon adjudication Mr. Goggin, as Trustee, applied for and obtained a permit under the California Sales and Use Tax Law and thereafter filed returns for the period March 12, 1946, to May 14, 1946.

5. The findings are incomplete in that they fail to disclose that Mr. Goggin's activities as Trustee in Bankruptcy during the period March 12, 1946, to May 14, 1946 and his activities prior thereto during the pendency of proceedings under Chapter XI, February 5, 1946, to March 11, 1946, inclusive, were identical.

6. The findings fail to disclose that the returns filed by Mr. Goggin for the period March 12, 1946, to May 14, 1946, disclosed all the sales set forth in Exhibit "A" (Rep. Tr. pp. 17-18-a, inclusive) with the exception of the five sales involved in this review.

7. The findings are incomplete in that they fail to disclose that the Board of Equalization duly determined, in the manner required by the California Sales and Use Tax Law, that additional taxes were due from the Trustee with respect to the five aforesaid sales; that the Trustee failed to petition for redetermination of that liability in the manner required by the California Sales and Use Tax Law and that said determination, accordingly, became final under the California Sales and Use Tax Law.

8. The findings are incomplete in that they do not disclose the interpretation of the California Sales and Use Tax Law by the State Board of Equalization, the body charged with administering said Law, as established by the testimony of John J. Campbell and Board's Exhibits 1, 2 and 3 (see Order re amendment of Referee's Certificate).

9. The findings are incomplete in that they fail to disclose that the five vehicles involved in this review had been used by the bankrupt in the course of a business for which he was required to hold a Sales Tax permit up to the date proceedings were commenced in the Bankruptcy Court.

Objection to the proposed findings is further made on the following grounds:

1. That there is nothing in the record to support the portion of proposed Finding V to the effect that the Board of Equalization was "attempting to enforce the payment of said Sales Tax as against the Trustee herein."

2. That proposed Finding VI is inconsistent with proposed Finding III in that Finding III discloses that the Trustee sold the vehicles in question, whereas proposed Finding VI discloses that the sales were made by the Court. The record discloses that the sales were made by the Trustee.

3. Proposed Finding VII is entirely unsupported by the record and is contrary to law.

Wherefore, it is respectfully requested that the Trustee's proposed findings be amended to satisfy the [129] foregoing objections.

Respectfully submitted,

FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,
Deputy Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for California
State Board of Equalization.

Affidavits of Service by Mail attached.

[Endorsed]: Filed Aug. 24, 1950. [130]

[Title of District Court and Cause.]

PROPOSED FINDINGS PURSUANT TO
OBJECTIONS HERETOFORE FILED

Pursuant to the Minute Order, Judge Weinberger's calendar, August 29, 1950, and the Objec-

tions to Proposed Findings heretofore filed in the within matter,

Comes Now the California State Board of Equalization by and through its counsel Fred N. Howser, Attorney General of the State of California, and James E. Sabine and Edward Sumner, Deputies Attorney General, and makes formal request for Findings as follows:

I.

That the within proceedings were initiated by the filing of a petition under Chapter XI on February 5, 1946.

II.

That the aforesaid proceedings under Chapter XI were terminated by adjudication on March 12, 1946.

III.

That George T. Goggin was duly appointed Receiver of the debtor's estate upon the commencement of proceedings under Chapter XI on February 5, 1946, and that he acted in that [133] capacity from February 5, 1946, to March 11, 1946.

IV.

That upon adjudication, as aforesaid, on March 12, 1946, George T. Goggin was duly appointed Trustee in Bankruptcy of the within estate and acted as such from that date to and including May 14, 1946.

V.

That during the pendency of proceedings under Chapter XI, George T. Goggin, as duly appointed

and acting Receiver for the estate of the debtor (presently the bankrupt), continued to conduct the business of the debtor.

VI.

That as Receiver for the debtor's estate under Chapter XI, George T. Goggin applied for and obtained a sales tax permit under the California Sales and Use Tax Law and filed returns under that Law on sales of tangible personal property at retail, and paid the tax under said Law for that period.

VII.

That upon adjudication, on March 12, 1946, George T. Goggin, as duly appointed Trustee in Bankruptcy of the within bankrupt estate applied for and obtained a permit under the California Sales and Use Tax Law, and thereafter filed returns under that Law for the period March 12, 1946, to May 14, 1946.

VIII.

That George T. Goggin's activities while acting as Trustee in Bankruptcy during the period March 12, 1946, to May 14, 1946, and his activities prior thereto while he was acting as Receiver under Chapter XI from February 5, 1946, to March 11, 1946, inclusive, were identical.

IX.

That during the period March 12, 1946, to May 14, 1946, [134] George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, made forty-four (44) sales of tangible personal property, six (6) of which were sales for resale.

X.

That on the returns filed by George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, for the period March 12, 1946, to May 14, 1946, he disclosed only thirty-nine (39) of the aforesaid sales, including the six (6) sales for resale, the last report sale having occurred on May 14, 1946.

XI.

That the returns filed by George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, for the period March 12, 1946, to May 14, 1946, failed to disclose five (5) sales which took place in open court on March 29, 1946, for a total consideration of \$10,875.00, said sales having been duly confirmed by an Order of this Court.

XII.

That upon audit of the returns filed by George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, by the California State Board of Equalization, said Board duly determined in the manner required by the California Sales and Use Tax Law that additional taxes were due from said Trustee with respect to the aforesaid five (5) sales occurring on March 29, 1946, measured by the gross amounts received by said Trustee from said sales.

XIII.

That George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, did not file a petition for redetermination of the tax liability determined to be due by the California State Board of Equaliza-

tion in connection with the five (5) sales, as aforesaid, and that said determination, accordingly, became [135] final under that Law.

XIV.

That the five (5) items sold by the Trustee in open court on March 29, 1946, consisted of five (5) vehicles which had been employed by the bankrupt immediately prior to the commencement of proceedings under the Bankruptcy Act in the course of a business for which it was required to hold a sales tax permit.

XV.

That it has been the long-continued administrative interpretation of the California Sales and Use Tax Law by the State Board of Equalization, the body charged with administering said Law, that said Law is applicable to trustees in bankruptcy who make sales of tangible personal property at retail.

XVI.

That subsequent to the Board's determination, as aforesaid, that George T. Goggin, as Trustee in Bankruptcy of the within bankrupt estate, was indebted to it under the California Sales and Use Tax Law for taxes attributable to the sales on March 29, 1946, neither the California State Board of Equalization, nor anyone in its behalf, made any effort whatsoever to enforce payment of the amount determined to be due, as aforesaid.

XVII.

That the California Sales and Use Tax Law pro-

vides a speedy and adequate remedy at law to contest the imposition of an invalid or erroneous liability under that Law.

Respectfully submitted,

FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,

/s/ EDWARD SUMNER,

Deputies Attorney General, Attorneys for California State Board of Equalization.

Affidavits of Service by Mail attached.

[Endorsed]: Filed Sept. 1, 1950. [136]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly to be heard upon the petition for the review of the Referee's Order, and the Trustee in Bankruptcy being represented by his counsel, Leslie S. Bowden, Esq., and the State Board of Equalization being represented by Fred N. Howser, Attorney General of the State of California and James E. Sabine and Daniel N. Stevens, Deputy Attorneys General, and Craig, Weller and Laugharn, Esqs. by Hubert F. Laugharn, Esq. and Thomas Tobin, Esq. having appeared as *amicus curiae*, and final arguments of counsel

having been made on the 6th day of December, 1949, and the matter having been submitted, the Court finds:

I.

The bankrupt herein, West Coast Cabinet Works, Inc., a corporation, was engaged in the business of manufacturing and selling cabinets and filed sales tax returns and paid [139] sales tax on sales at retail under the California Sales and Use Tax Law.

II.

On February 5, 1946, said corporation filed a petition under Chapter XI of the Bankruptcy Act, and George T. Goggin as receiver of the debtor was authorized to conduct the business of said debtor and sell the same as a going concern; as such receiver, he applied for and obtained from the Board of Equalization of the State of California a seller's permit to engage in the business of selling tangible personal property at retail and to and including March 12, 1946, and conducted the business of the bankrupt and engaged in the business of selling tangible personal property at retail, and paid sales tax on sales at retail under the California Sales and Use Tax Law.

III.

On March 12, 1946, said corporation was adjudicated a bankrupt, and George T. Goggin as the appointed trustee was authorized by order of Court to conduct the business of the bankrupt for a limited period. As such trustee, he applied for, and obtained from the Board of Equalization of the State

of California a seller's permit to engage in the business of selling tangible personal property at retail, and to and including March 22, 1946, he conducted the business of the bankrupt and engaged in the business of selling tangible personal property at retail, and paid sales tax on sales at retail under the California Sales and Use Tax Law.

IV.

On March 22, 1946, said trustee was directed by order of court to sell the assets of the estate either at public auction or private sale. Thereafter, and to and [140] including May 14, 1946, he made various sales of the assets of the bankrupt estate, and filed sales tax returns prepared by a representative of the Board of Equalization in conjunction with an employee of the trustee; during such period the trustee made approximately twenty sales at retail, and all of such sales were included on sales tax returns under which sales tax was paid excepting the sales of five trucks hereinafter mentioned.

V.

On March 29, 1946, pursuant to said order of March 22, 1946, the trustee sold at retail at public auction in open court, subject to the confirmation of court, five trucks which had been used by the bankrupt in the conduct of his business; each of said five trucks was sold to a different person; the amount of the sales tax was not included in the purchase price thereof. Said sales were confirmed by order of court. Said sales were not reported on any sales tax return.

VI.

That the Board of Equalization instructed its local officers prior to the issuance of the injunction herein that the trustee in making the sales of said five trucks as aforesaid was subject to the provisions of the Sales and Use Tax Law of the State of California and instructed said officers to apply the provisions of said Law to the trustee herein with reference to said sales.

VII.

The Board of Equalization made an additional determination of taxes due and owing from the trustee, basing said assessment upon the gross receipts from the sales of the five trucks; notice of such assessment was mailed to the trustee, no petition for redetermination was filed within [141] thirty days thereafter, and a penalty of 10% was added by the Board to the amount claimed to be due from the trustee, and the trustee has refused to pay said tax or penalty.

VIII.

That said Board of Equalization, prior to the issuance by the Referee of the injunction herein, and at the time of the issuance of said injunction was attempting to, and unless restrained will, enforce the provisions of said Law against the trustee and the bankrupt estate herein.

IX.

That during the period subsequent to the order of court directing the trustee to sell the assets of

the estate, said trustee was not authorized to conduct any business, and did not conduct any business, and did not engage in the business of selling tangible personal property, and was not a "person," or a "retailer," or a "seller" as defined in said California Sales and Use Tax Law.

X.

The trustee has no plain, speedy or efficient remedy in the courts of the State of California with reference to the matters involved herein.

From the foregoing findings of fact, the Court makes it Conclusions of Law:

I.

This Court has jurisdiction in the premises.

II.

The Referee had jurisdiction to hear and determine the matters which are the subject of this review.

III.

The trustee herein, in making the sales of the five trucks mentioned in Finding V was not subject to the provisions of the California Sales and Use Tax Law. [142]

IV.

The application of any of the provisions of the California Sales and Use Tax Law by the Board of Equalization of said State as against the trustee herein with reference to the sales of the five trucks mentioned in Finding V is contrary to said Law.

V.

The trustee has no plain, speedy or efficient remedy in the courts of the State of California with reference to the matters involved herein.

VI.

The order of the Referee in issuing the injunction herein should be approved, and the petition to review filed by the Board of Equalization of the State of California should be denied.

Dated: September 29, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed Oct. 2, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 44,249-W, Bkey.

In the Matter of

WEST COAST CABINET WORKS, INC.,

Debtor.

ORDER DENYING PETITION TO REVIEW

The petition of the State Board of Equalization of California for review of the Referee's order of December 9, 1946, is denied.

The order of the Referee permanently enjoining the said Board from enforcing as against the trustee

in bankruptcy or the bankrupt estate herein any of the provisions of the California Sales and Use Tax Act with reference to the sales by the trustee, on March 29, 1946, of five trucks, is approved.

Dated: September 29, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

Judgment entered Oct. 5, 1950.

[Endorsed]: Filed Oct. 2, 1950. [144]

In the District Court of the United States, Southern District of California, Central Division
No. 44,249-W

In the Matter of

WEST COAST CABINET WORKS, INC.,
Bankrupt,

HEARING ON ORDER TO SHOW CAUSE ON
PETITION OF TRUSTEE ON MEMBERS
OF THE STATE BOARD OF EQUALIZATION

The following is a stenographic transcript of the proceedings had in the above-entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at ten o'clock a.m., Thursday, October 31, 1946.

Appearances:

LESLIE S. BOWDEN, ESQ.,

Appearing on behalf of the Trustee,
George T. Goggin, Esq.

ROBERT W. KENNY,

Attorney General of California, and

DANIEL N. STEVENS,

Deputy Attorney General, appearing on
behalf of the Board of Equalization.

The Referee: In the Matter of West Coast Cabinet Works, Inc., hearing on Order to Show Cause on Petition of Trustee on members of the State Board of Equalization, I understand Mr. Stevens, representing the State Board of Equalization, wants to make what he calls a model case for the purpose of going to the United States Supreme Court and relieve us once and for all of the question of whether or not we should pay a sales tax on a Trustee's liquidation sale. With that in mind, I am going to adopt a broad liberal attitude and let him prove everything he can.

Mr. Stevens: If the Court please, in talking with Mr. Bowden last night, Mr. Bowden learned of some facts which our records disclosed and have caused him to want a little additional time in order to present their portion of the case. I have Mr. J. J. Campbell here from Sacramento this morning. He is the Sales Tax Administrator. Mr. Bowden has

agreed that his testimony may be put on at this time.

The Referee: All right, sir, we will hear him.

Mr. Bowden: Before we start, if the Court please, at the last hearing it was stipulated that the Trustee's petition might be amended. I have here a written stipulation on the matter and if the Attorney General will sign it I will present the amended petition at this time.

Mr. Stevens: May I see the amended petition?

Mr. Bowden: It does not change the fundamental facts. [2*] I have appended a short order to the stipulation, if the Court please.

The Referee: All right, sir.

Mr. Stevens: I assume the Order to Show Cause would have been issued on the amended petition, so I am glad to stipulate with Mr. Bowden that it may be amended in that fashion.

At this time, for the purposes of this record, for review, I would like to have made a part of this record the First Report and Account of Trustee, Petition to pay expenses of administration, and Petition for dividend, filed July 17, 1946.

The Referee: All right, sir. That is a part of our official record.

Mr. Stevens: Yes, your Honor. I would like particularly to refer to that portion of paragraph 3 from which I now quote:

“That your Trustee attended various meetings in court and conferred with various and numerous persons with respect to the purchase and sale of cabinets and scrap lumber, etc., and was authorized

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

by the court to continue the operations and to sell the incidental merchandise.”

Also the portion in paragraph 6, “That your Trustee also believes that he is entitled to additional compensation for maintaining and operating the business of the Bankrupt from March 12, 1946, to on or about May 10, [3] 1946, in the amount of \$604.89.”

I would also like to have made a part of this record the First and Final Report and Account of Receiver, Petition to pay expenses of administration and Petition for discharge, filed also on July 17, 1946, with particular reference to that portion of paragraph 2 which reads:

“That your Receiver also went to the former plant of the debtor located at 2721 Artesia Street, North Long Beach, California and thereafter contacted various contractors who had previously given orders to the Bankrupt for the purchase of said pine kitchen cabinets; that your Receiver decided that a greater realization would be made from the assets by continuing the operations to complete the orders on hand as far as the materials were available; that your Receiver also contacted various sellers of pine lumber and was successful in arranging for a delivery of a small portion thereof which was necessary for completion of the cabinets; that your Receiver thereupon caused a skeleton force to complete the cabinets and arranged to sell the same to various purchasers; that during the operation as Receiver, and subsequently as Trustee, your peti-

tioner received from the sale of assets pursuant to his operation a sum in excess of \$7000."

Also, with reference to paragraph 5 of that petition I quote:

"That your Receiver as Trustee sold merchandise, materials and other assets of the Bankrupt and is accounting in the proceedings herein as Receiver or Trustee for the total sum of \$47,078.38; that your Receiver's statutory compensation on said sum is \$610.78; that your Receiver also believes that he is entitled to additional compensation for maintaining and operating the business of the Bankrupt from February 5, 1946 to March 12, 1946, in the amount of \$450."

I would also like to make part of this record the order of August 20, 1946, signed by Hubert F. Laugharn, Referee in Bankruptcy, approving the First Report and Account of Trustee and authorizing payment of expenses of administration. This order was the culmination of the hearing had on August 8, 1936, at ten a.m., before said Referee. In that order I would specifically like to direct the Court's attention to the fact that in addition to the Receiver's fee of \$610.78 there was allowed the amount of \$450 additional for operating the business and that in addition to the Trustee's fee one-half of which amounted to \$302.44 and which was authorized to be paid by that order there was also a fee of \$500 paid to the Trustee for operating the business.

I would also like to make part of this record the

order of sale signed by Hugh L. Dickson, Referee in Bankruptcy, dated and filed March 22, 1946.

Mr. Bowden: What does that refer to, the trucks in question? [5]

Mr. Stevens: No. This is a general order which reads: "It is hereby ordered that said Trustee be and he is hereby authorized and directed to sell all of the property of the estate of said Bankrupt of whatsoever nature and description that is or may hereafter come into his possession or control either at private sale or public auction as in the discretion of the Trustee shall be to the best interests of the estate of said Bankrupt; any sale or sales of the whole or any part thereof, at private sale, to be subject to the approval and confirmation of this Court; any sale or sales of the whole or any part thereof, at public auction, to be the sum not less than seventy-five per cent of the appraised value of such property so sold."

Mr. Bowden and I have been attempting to arrive at a stipulation of facts of which I advised Mr. Bowden last night and I think that a little additional time is going to be necessary before we can get together on that. Therefore, with the Court's permission, we would like to continue the matter for that purpose. I do have a witness here and I can go ahead with him.

The Referee: All right, let's have him. Bring him up. [6]

* * *

IVAN F. KINGMAN

called as a witness on behalf of the Board, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your full name?

A. Ivan F. Kingman.

Q. By whom are you employed?

A. The State Board of Equalization.

Q. What is your position with the Board?

A. I am field auditor.

Q. For the Sales Tax Division?

A. For the Sales Tax Division, yes, sir.

Q. How long have you been so employed?

A. Since 1935.

Mr. Bowden: If the Court please, technically I think the burden is on the Trustee to proceed under his Order to Show Cause, but I have no objection to counsel for the Attorney General's Office taking the burden for the purpose of shortening the matter.

Mr. Stevens: If you were prepared to go ahead. I understood you were not.

Mr. Bowden: Yes, but I wanted to keep the record straight as to what order we are proceeding under. Here you are proving the tax due or taking the testimony for the purpose of introducing it later on when we get into the [7] main proceeding.

Mr. Stevens: If you would be willing to stipu-

(Testimony of Ivan F. Kingman.)

late that this testimony may come in out of order.

Mr. Bowden: Let's stipulate his testimony may come in out of order subject to all objections.

Mr. Stevens: At this time? Will you make objections now?

Mr. Bowden: I will make objections now, yes.

Mr. Stevens: Fine.

Mr. Bowden: I also would like to reserve objection to the testimony in its entirety before we put in the main case.

The Referee: Let's find out what it is first.

Mr. Bowden: I am not objecting, if the Court please.

The Referee: Oh, I misunderstood.

Mr. Bowden: I am simply getting the record in shape as to the method of procedure. I am not objecting to anything at this time.

The Referee: All right. What is your next question?

Mr. Stevens: You are not going to object on the ground the original records are not here?

Mr. Bowden: No, I won't make any technical objections.

Q. (By Mr. Stevens): Now, Mr. Kingman, have you examined the books and records of George T. Goggin, the Trustee of West Coast Cabinet Works, Inc.? [8] A. Yes, I have.

Q. Have you compared those books and records with the audit report upon which the tax which is the subject of this order to show cause was based?

A. Yes, sir.

(Testimony of Ivan F. Kingman.)

Mr. Stevens: I have prepared here a schedule of sales and if we can agree that this witness will testify to these sales in the manner in which I will indicate I think we could simplify the matter greatly, Mr. Bowden.

The Referee: Am I to understand that these sales were made by the Trustee when he was operating the business? Is that your contention?

Mr. Stevens: That is the contention, your Honor, that the sales made by him were made while he was authorized so to do.

The Referee: And operated the business?

Mr. Stevens: Yes, and also the sales are of such a number so as to constitute the Trustee a retailer within the meaning of the applicable legislation.

Mr. Bowden: I will have to object to the introduction of any evidence of the Trustee's sales except those sales which are subject to the issue in this proceeding. The automobile trucks are the only issue, as to whether or not we are liable for the tax on the particular trucks. They have assessed the Trustee and the Trustee has refused to pay. I don't think we are concerned with any other sales [9] he made.

The Referee: Did they assess a tax on any other sales?

Mr. Bowden: No, only on the trucks. The taxes have been paid in the conduct of the business by the Trustee. Then when he sold these trucks he refused to pay it and the State Board of Equaliza-

(Testimony of Ivan F. Kingman.)

tion objected to it and assessed him and we are here on that matter today.

The Referee: Is that true, sir?

Mr. Stevens: No, Your Honor, it is not an accurate statement.

Mr. Bowden: I am sorry.

The Referee: What is the accurate statement?

Mr. Stevens: Mr. Goggin, both as Receiver and as Trustee, applied for a sales tax permit from the Board of Equalization and that was issued permitting him to conduct the business of selling the tangible personal property at retail in the State of California. Mr. Goggin has filed sales tax returns both as Receiver and as Trustee with the State Board of Equalization reporting both sales at retail and sales for resale which are deductible, but both of which are required to be reported on the returns. These returns were filed and the tax was remitted to the State Board of Equalization by Mr. Goggin for the amount shown by those returns to be due.

The Referee: Let me ask you right there. Are those returns he made the same items about which you propose to [10] ask this gentleman some questions? Are they the same sales?

Mr. Stevens: That is true, Your Honor.

The Referee: I don't see how that would be material. If he reported the sales and paid the tax on them, how would that be material?

Mr. Stevens: This is the reason it would be material, Your Honor, because—if I might pro-

(Testimony of Ivan F. Kingman.)

ceed with the mechanics I think I can show its materiality.

The Referee: Very well.

Mr. Stevens: The auditor goes and examines the books and records to see whether or not Mr. Goggin has reported all of the taxable sales made by him. He found that in addition to the sales reported there were the sales of these five trucks which were not reported. Therefore, the auditor considering all of the sales made during the taxable period determined that Mr. Goggin was a retailer within the meaning of the Act—he had already applied for it—and all such sales should have been returned, and because of his failure to return the sales tax on the gross receipts from the sale of these five trucks the tax was assessed against him in this proceeding. Now, unless we have the entire picture of the sales made by Mr. Goggin during the period in question it would be impossible for the Board to determine whether or not he was a retailer.

The Referee: You know he is a retailer because you granted him a license as such. [11]

Mr. Bowden: I will stipulate he did not make the return on those five trucks, if the Court please.

The Referee: But they want this gentleman to recite all of the sales on which the tax was paid. I don't think that is material. The question is: Did he as retailer sell the five trucks and is he amenable for taxes?

Mr. Bowden: That is my position, Your Honor.

Mr. Stevens: They are claiming he is not a re-

(Testimony of Ivan F. Kingman.)

tailer and therefore is not subject to the tax. Now, we have here, and our exhibit will show there were sold—this particular Bankrupt was engaged in the manufacture and sale of cabinets and cupboards.

The Referee: Yes, I remember that.

Mr. Stevens: We will show by this exhibit that Mr. Goggin as Receiver and as Trustee, in addition to selling these cabinets, sold all types of machinery and equipment which was used in that business, such as boring machines and rip saws, and various types of materials and wood products and motors.

The Referee: Did he pay a tax on them?

Mr. Stevens: He reported and paid a tax on them.

The Referee: That is as far as I am going. I am going to limit you to the question of whether or not he should pay a tax on the trucks. In other words, he has paid his score on the other things, so why put them in?

Mr. Stevens: Because it is necessary, your Honor. [12]

The Referee: It has no bearing on it. I will rule it out. Confine yourself to the contention that he should pay a tax on these trucks. That is the ruling.

Mr. Stevens: All right.

The Referee: Now, what is the next question?

Mr. Stevens: I would like to make an offer of proof at this time, if the Court please, in order to get our record in such shape that we want it.

The Referee: All right, sir, make it.

(Testimony of Ivan F. Kingman.)

Mr. Stevens: May I confer with counsel for just a moment on this question of the offer of proof?

The Referee: Yes, sir.

(A short recess was had at this point.)

Mr. Stevens: I would like to offer to prove by this witness that the books and records of the Trustee herein disclose that a sale was made on March 12, 1946, to Roy H. Alward and D. M. Townsend of scrap lumber, which sale was reported in the sale tax return of the Trustee as a sale for resale.

The Referee: And tax paid, is that true?

Mr. Stevens: There would be no tax paid on a sale for resale.

The Referee: I see. Proceed.

Mr. Stevens: That on March 12, 1946, a sale was made by the Trustee to Wilson-Cox Construction Company of cabinets in the amount of \$457.74, and that that sale was [13] reported as a retail sale in the sales tax return of the Trustee filed with the State Board of Equalization and that a tax was paid in the amount so reported.

I will offer to prove that on March 12, 1946, additional cabinets were sold to Wilson-Cox Construction Company in the amount of \$457.74, which sale was reported as a retail sale in the sales tax return filed by the Trustee and tax was paid upon that amount.

I will offer to prove that on March 12, 1946, a sale was made to Harry Hays of Plywood New-tone and cabinet doors in the amount of \$240.04, which amount was reported in the sales tax return of the

(Testimony of Ivan F. Kingman.)

Trustee as a retail sale and the tax was paid upon that sale.

I will offer to prove on March 12, 1946, a sale was made to D. M. Townsend and Roy H. Alward of a Davis & Wells boring machine with Reuland motor, an Irvington swing saw with table, Craftsman belt sander with Peerless motor, and assorted wood-push-around hand trucks in the amount of \$475, that this amount was reported in the sales tax return of the Trustee as a retail sale and the tax was paid upon that amount.

Now, rather than take up the time of the Court and go through this list item by item, I have here an exhibit which I have marked Exhibit A, which sets forth these matters item by item, the date of sale, vendee, the item, whether for retail sale or sale for resale, and whether or not under [14] the heading "Sales tax reimbursement," Mr. Goggin as Trustee added the sales tax to the amount which he charged the vendee of the merchandise sold. I will offer to prove by this witness that all of the sales were made as indicated and were reported as shown with the exception of these five items which appear on the second page of this exhibit.

The item of March 29, under "Vendee," the vendee was D. E. Krumweide, 1936 Chevrolet 6 Pick-up Truck M No. 6462026 in the amount of \$405;

The item of March 29, 1946, John J. Williams, as vendee, of a 1945 Chevrolet 6 Stake Truck M. No. BG-792415 in the amount of \$2500;

The item dated March 29, 1946, showing a sale

(Testimony of Ivan F. Kingman.)

to Harold Shaw on that date of a 1945 Chevrolet 6 Stake Truck M No. BG-782396 in the amount of \$2,535;

The sale of March 29, 1946, to the Valley Pipe & Supply Company of a 1945 Chevrolet 6 Stake Truck M No. BG-790983 in the amount of \$2,705.

Sale dated March 29, 1946, to S. Glen Hickman of a 1946 Chevrolet 6 Spec. Body Truck M No. BG-709067 in the amount of \$2,725.

Those five sales were not reported by Mr. Goggin and I offer to prove by this witness that these were the five sales upon which the tax is assessed in this proceeding.

Mr. Bowden: I will so stipulate that those five sales, [15] that they are the sales on which the State Board of Equalization has assessed the Trustee for the tax under the State Sales Act and the Trustee has not paid the same and has refused to so pay. Do you accept that stipulation?

Mr. Stevens: Would you read the stipulation?

(Remarks of Mr. Bowden read by the reporter.)

I will so stipulate.

Now, in order to save going through these item by item, have you any objection to the form of my offer of proof if I make that offer by this exhibit?

Mr. Bowden: I have no objection to your using that document as your offer of proof.

Mr. Stevens: And that this witness would so testify if he were permitted to do so?

Mr. Bowden: So stipulated. [16]

EXHIBIT "A"

Date of Sale	Vendee	Item	Retail Sale	Sale for Resale	Sales Tax Reimbursement
3/12/46	Roy H. Alward & D. M. Townsend	Scrap lumber		\$ 75.00	
3/12/46	Wilson-Cox Const. Co.	Cabinets	\$ 457.74		
3/12/46	Wilson-Cox Const. Co.	Cabinets	457.74		
3/12/46	Harry Haye	Plywood, New-tone, cabinet doors	240.04		
3/12/46	D. M. Townsend & Roy H. Alward	Davis & Wells boring machine with Reuland motor; Irvington swing saw with table; Craftsman belt sander with Peerless motor; assorted wood-push-around hand trucks	475.00		
3/12/46	Window Shade Prod. Co.	Bental Margeant 18" rip saw with G.E. 10 H.P. motor	975.00		
		American 12" stieker with G.E. 20 H.P. motor	815.00		
		24" blower with U.S. 5 H.P. motor	150.00		
3/12/46	George Gaskin	Obsolete cuts of lumber		25.00	
	Trojan Cupboard Co.	Obsolete cuts of lumber		200.00	
	Window Shade Prod. Co.	Obsolete cuts of lumber		675.00	
3/15/46	Window Shade Prod. Co.	Cupboard		5.00	
3/15/46	Gregg & Gedney	Plywood	74.50		

Exhibit 'A'—(Continued)

Date of Sale	Vendee	Item	Retail Sale	Sale for Resale	Sales Tax Reimbursement
3/19/46	Harvey & Rose.....	Cabinets	\$ 65.81		\$ 1.69
3/19/46	Harold L. Shaw.....	11 kitchen units.....	1,009.30		.60
3/19/46	Harvey & Rose.....	4 upper cupboard cabinets.....	24.36		
3/19/46	D. M. Townsend & Louis Lampe	1 lot lumber; scrap pe.....	40.00		
3/19/46	Cash Sale	3 pc. lumber 4 x 6 x 2'.....	2.00		.05
3/19/46	D. E. Krumweide.....	Sale of lumber in bins and tables of heavy material	500.00		
3/19/46	H. E. Sawyer Cab. Works.....	398 pc. lumber of various sizes.....		557.25	
3/19/46	Southern Lumber Co.....	480½ pc. lumber of various sizes.....		607.13	
3/22/46	D. E. Krumweide.....	Order nails; 13 kegs broken; 1 order hardware hinges and catches.....	156.00		3.90
3/22/46	Ed Dassen & Sons.....	1 blower and motor complete.....	190.00		4.75
3/22/46	Paul Johnson	1 order doors, drawers and odd pcs. lumber..	150.00		3.75
3/22/46	Olims Furn. Mfg. Co.....	1 set toilet equipment.....	12.50		.31
	Harold L. Shaw.....	2 shop desks and 2 bags dowels.....	56.75		1.40
3/22/46	Southern Lumber Co.....	15 sets incomplete cabinets.....		425.00	
3/26/46	United Bldg. Co. of Calif.....	9 cupboard cabinet units, plans B, C and D..	872.61		

Exhibit "A"—(Continued)

Date of Sale	Vendee	Item	Retail Sale	Sale for Resale	Sales Tax Reimbursement
3/26/46	Ruby Hehr	21 pc. black plumbing pipe and 10 rolls roofing paper	\$ 20.00		\$ 0.50
3/26/46	Wilson-Cox Const. Co.	Cabinets for 1550-52 & 1600-02 Gardena St.	457.74		
3/26/46	Transit Mixed Concrete Co.	1 American 6" sticker	568.50		14.21
3/29/46	D. E. Krumweide	1936 Chev. 6 pick-up truck M. No. 6462026	405.00		
3/29/46	John J. Williams	1945 Chev. 6 stake truck M. No. BG-792418	2,500.00		
3/29/46	Harold Shaw	1945 Chev. 6 stake truck M. No. BG-782397	2,535.00		
3/29/46	Valley Pipe & Supply Co.	6 stake truck M. No. BG-790983	2,705.00		
3/29/46	S. Hlen Hickman	1946 Chev. 6 special body truck M. No. BG-709067	2,725.00		
3/29/46	Harold L. Shaw	Miscellaneous equipment	1,656.36		
4/ 1/46	Transit Mixed Concrete Co.	12,500 dowels	21.75		.53
4/16/46	D. E. Krumweide	Remington-Rand Adding Machine	210.00		5.25
4/16/46	Roy Alward	25,000 dowels		43.50	
4/16/46	Olins Furn. Mfg.	Simplex Time Clock & six time clock racks	105.00		2.65
4/23/46	B'ilders' Control Ser., Inc.	Cabinets	205.59		
5/ 1/46	Milton J. Wershaw	Proceeds from auction sale of machinery, equipment, etc.		8,768.35	
5/14/46	Wm. H. Cochrane Co. Inc.	Cabinets for job at 1069 N. Wilson	133.60		

(Testimony of Ivan F. Kingman.)

The Referee: All right. The offer is denied on the ground I see no materiality in proving that the articles were sold and the taxes were paid. That is water over the dam. Your only contention now is that he should have paid a tax on the sale of these five trucks and he has not done so.

Mr. Stevens: That is correct.

The Referee: So the offer will be denied in so far as it applies to the transactions on which the sales were made and the tax was paid.

Anything further with this witness?

Mr. Stevens: That is all I have to ask this witness, Your Honor.

The Referee: All right, sir. Stand aside.

Mr. Stevens: I will call Mr. Campbell to the stand. [19]

JOHN J. CAMPBELL

called as a witness on behalf of the Board, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. State your full name, please.

A. John J. Campbell.

Q. Where do you live, Mr. Campbell?

A. 3928 Downey Way, Sacramento.

Q. By whom are you employed?

A. The State Board of Equalization.

Q. What is your position?

(Testimony of John J. Campbell.)

A. State Sales Tax Administrator.

Q. For how long have you occupied that position? A. Since October 1, 1943.

Q. Prior to that time what was your position?

A. Prior to that, since 1936, January, 1936, to September 30, 1943, I was District Tax Administrator in the Los Angeles district. Prior to that I had been employed by the Board for twenty-four years in tax work.

Q. In your position as sales tax administrator and as district tax administrator in Los Angeles, are you familiar with the administrative practices of the Board with respect to the application of the sales tax to various factual situations?

A. I am. [20]

Q. Will you explain the scope of your duties?

A. I am at the head of the Sales Tax Division. Under my direct jurisdiction all assessments are made. Instructions are issued to the field, to the District Tax Administrators, regarding the application of the tax and in regard to accounting matters, procedure in accounting matters.

Q. Have you issued any instructions to your staff with respect to the application of sales and use tax law to sales by trustees in bankruptcy?

Mr. Bowden: Answer yes or no, please.

The Witness: Yes.

Q. (By Mr. Stevens): What are those instructions?

Mr. Bowden: Objected to as incompetent, irrelevant and immaterial.

(Testimony of John J. Campbell.)

The Referee: Are they printed instructions?

The Witness: No, Your Honor.

Mr. Bowden: I object on the further ground, if the Court please, there is no proper foundation laid.

The Referee: I don't see what materiality that has, what instructions he gives to employees. The question here is, is there a tax due on these five automobiles. The objection is sustained. I won't encumber this record with a lot of immaterial evidence.

Mr. Stevens: May I point out, Your Honor, that the Supreme Court of California in the cases of Coca Cola Company [21] versus State Board of Equalization, 25 Cal. 2d, 918, 921; Shealor versus City of Lodi, 23 Cal. 2d, 647, 653, 654; Los Angeles County versus Superior Court, 17 Cal. 2d. 707, 712.

The Referee: What do they hold?

Mr. Stevens: These cases hold that the administrative construction of a statute by the agency authorized and required to apply the tax should be accorded great weight and such interpretation will be followed by the courts unless clearly erroneous.

The Referee: I am not influenced much by that. You cannot change the Bankruptcy Law by a State law or a State rule of administration. The objection is sustained. This is a Bankruptcy Court. We are not bound by State process.

Mr. Stevens: I will offer to prove that if Mr. Campbell were asked—I just want to say this before I do that, that Your Honor has expressed on numerous occasions the desire to have this matter settled.

(Testimony of John J. Campbell.)

The Referee: I am very anxious to have it settled because every time you folks hire a new man he comes in with the same contention. It has gone to the Ninth Circuit. You say you are not bound by the Ninth Circuit decision and here you come again. I would like to see it settled finally by some authority that you gentlemen will accept, obey, and pay heed to. You say you are not bound by the Ninth Circuit. Maybe if the United States Supreme Court speaks in no uncertain terms you might pay some attention to it. [22]

Mr. Stevens: With respect to the reference to the Ninth Circuit, certain decisions have been decided which indicates the Federal Court gave an erroneous forecast of the State law in that case. We also wish if necessary to petition to the United States Supreme Court in order that a decision may be made determining the matter. In view of the fact Your Honor thinks the testimony is immaterial——

The Referee: I do.

Mr. Stevens: May I say this, that if we cannot get our evidence into the record we obviously will have to wait until we can go before another Referee who will permit the introduction of this testimony.

The Referee: All right, sir.

Mr. Stevens: We want to get all of our evidence in. It cannot affect your opinion because you deem it immaterial. I mean is there any harm done in that?

The Referee: You asked this gentleman to tell

(Testimony of John J. Campbell.)

you what instructions he gave. If you have written instructions I would be interested in seeing them. But to ask this man to repeat eight months after he gave oral instructions, what he said, is almost putting credulity to a severe test. How can he remember instructions given to someone months ago?

Mr. Stevens: They have conferences and decide on matters of policy.

The Referee: I will stand by my ruling that it is immaterial. Every taxing authority I ever had anything to [23] do with issued printed bulletins. The Internal Revenue Department and others have done it. Why these gentlemen gave it out by word of mouth I don't know.

Mr. Stevens: What was the last question?

(Record read by the reporter.)

Before I make an offer of proof in order to answer that question I think it is necessary for me to lay a foundation, if the Court please.

Q. In what manner were those instructions given?

A. They were given at conferences between the office of headquarters, between my office and the district offices, and they were given in written letters to firms of attorneys who inquired as to our position on the matter.

Q. What are those instructions? (To counsel:) You can go ahead and make your objection.

Mr. Bowden: We object on the ground it is incompetent, irrelevant and immaterial, no proper

(Testimony of John J. Campbell.)

foundation laid, not tending to prove or disprove any issue in this proceeding.

The Referee: The objection will be sustained.

Mr. Stevens: I will offer to prove by this witness if he were permitted to answer that question that he would testify the district Tax Administrators and the auditing staffs of the State Board of Equalization have been instructed to apply the sales and use tax law to a Trustee in Bankruptcy under either of two situations:

If the auditor in making his audits finds that [24] the Trustee has continued the business of the bankrupt retailer and subsequently has sold the retailer's merchandise and equipment in liquidation of the bankrupt's estate, the tax is applied under those circumstances to all sales whether sales of stock, goods, or of equipment used in the retail business.

Under the other theory the auditing staff is instructed that the Trustee's sale of tangible personal property in liquidation of the bankrupt's estate must be examined to see whether they are of a character and number to constitute the Trustee as a retailer within the purview of the sales and use tax law.

In this connection the auditing staff is further instructed that if two or more sales are made in any taxable period the Trustee is to be considered a retailer within the meaning of the sales and use tax law and that if such sales are sales at retail which are sales to an ultimate consumer or for any other

(Testimony of John J. Campbell.)

purpose other than resale, the Trustee is to be assessed a tax measured by the gross receipts from such sales.

I will offer to prove by this witness that the instructions which have been adopted and the administrative practice which has been employed by the Board since the effective date of the California Retail Sales Act is to regard the sales tax as applicable to gross receipts from sales of tangible personal property made by administrators [25] and executors of probate estates in connection with the liquidation of the estates of decedents and by trustees and receivers in State courts as well as in the Federal Court, assignees for the benefit of creditors, State liquidators, such as the Building and Loan Commissioner of the State of California when that officer takes over a corporation for the purposes of liquidation and makes sales of tangible personal property, the State Superintendent of Banks when the State Superintendent takes over a banking institution and makes sales of the tangible personal property belonging to the bank. Another example would be when the Insurance Commissioner takes over an insurance company for the purpose of liquidation and sells tangible personal property within the State of California as well as other fiduciaries in connection with the liquidation of property in insolvency proceedings.

I will offer to prove by this witness that when the entire tangible personal property of the estate is disposed of in one or two sales and the estate

(Testimony of John J. Campbell.)

does not otherwise sell tangible personal property the Board's administrative practice is and has been to regard such a sale as not within the taxing province of the law for the reason that the making of one or two sales of tangible personal property is not regarded as constituting the seller a retailer as defined under Section 2(E) of the Retail Sales Act of the State of California and Section 6015 of the [26] Revenue and Taxation Code of the State of California. It is the administrative practice where tangible personal property is disposed of by retail sales in series of more than two transactions that the seller, whether he be an executor, administrator, trustee, or other representative, is regarded as a retailer to the same extent as would be an individual or firm disposing of his or its own property.

Q. Now, Mr. Campbell, how are your administrative instructions applicable to the facts of this case?

Mr. Bowden: We object to that on the ground it is immaterial, incompetent, and irrelevant.

The Referee: Shouldn't we dispose of the offer of proof first? Is that the end of your offer of proof?

Mr. Stevens: At that point, yes.

The Referee: I will permit the witness to say that in probate matters and in the other matters which you have mentioned that taxes have been paid, but it appears to me that Mr. Campbell's instructions are merely his interpretation of the law and I do not consider that Mr. Campbell is the

(Testimony of John J. Campbell.)

proper tribunal in which to finally determine what is the law.

Mr. Stevens: Yes.

The Referee: Therefore, the whole offer will be denied except that portion of it in which you offer to prove that in probate estates and in other matters such as banks, insurance companies, and things of that sort, [27] taxes have been levied and have been paid. I will permit him to make that statement.

Mr. Stevens: I have not asked that direct statement yet. I will ask him now.

The Referee: In your offer of proof wasn't it his instructions to levy on estates and so forth?

Mr. Stevens: Yes. Now I will ask him about it.

The Referee: As I said a moment ago, I don't think it is the function of any administrative office to determine what the law is. He can give his instructions, but they are merely his opinions. However, I will permit him to answer if such taxes have been levied and paid on probate estates and probate sales.

Mr. Stevens: I will ask that question.

Q. Has the California Sales Tax been applied and have assessments been issued with respect to sales by executors and administrators of probate estates for the purpose of liquidating the assets of the decedents?

Mr. Bowden: Objected to as immaterial.

The Referee: The objection will be overruled. I will let him answer that far.

The Witness: Yes, sir.

(Testimony of John J. Campbell.)

The Referee: Were any of them paid under protest?

The Witness: Your Honor, I have about twelve here that I picked at random when I came down.

The Referee: Did any pay under protest? [28]

The Witness: No.

Mr. Stevens: He has examples of the files in such cases.

The Referee: Many of us pay taxes under protest and then ultimately we get a refund. That happened to me once, in income tax, and I was curious whether any of them paid under protest.

The Witness: There doesn't happen to be any provision in the sales tax law for protest. They pay and then bring action to recover. They can pay under protest, that is, in the nature of filing a petition for re-determination, and if that is denied by the Board they can pay the taxes and bring action to recover taxes.

The Referee: All right.

Q. (By Mr. Stevens): Mr. Campbell, have you here in court with you some files illustrating situations where administrators have been assessed taxes in such a situation?

The Referee: I don't think that is necessary, Mr. Stevens. You have here the fact that such taxes have been levied, assessed, and paid. Now, that is sufficient.

Mr. Stevens: I agree with your Honor.

The Referee: It may be nine or nine hundred. One is plenty. All right, sir.

(Testimony of John J. Campbell.)

Q. (By Mr. Stevens): Have you also assessed taxes for sales in [29] liquidation by receivers in the State courts?

Mr. Bowden: Objected to on the ground it is immaterial.

The Referee: I will permit the answer.

The Witness: Yes, sir.

Q. (By Mr. Stevens): Do your records disclose that such taxes have been paid?

A. Yes, sir.

Q. I did not ask you that same question in connection with executors and administrators. Do your records disclose that taxes assessed in such circumstances have been paid? A. Yes, sir.

Q. And that no refund has been made of taxes in either of those two situations?

A. Not to my knowledge, no, sir.

Mr. Bowden: We object to that on the ground it is immaterial.

The Referee: I think that is going too far. Maybe the taxpayer died or got disgusted or moved away. There might be many reasons why they did not bring suit. Objection sustained to that.

Q. (By Mr. Stevens): Have you assessed the sales tax on sales by assignees for the benefit of creditors when those sales have been made for the purpose of liquidating the assets of the assignor?

Mr. Bowden: Objected to on the ground it is immaterial.

The Referee: Objection overruled. You may answer.

(Testimony of John J. Campbell.)

The Witness: Yes, sir.

Q. (By Mr. Stevens): Have such assessments been paid? A. Yes, sir.

Q. Have such assignees reported and paid sales taxes under such situations? A. Yes, sir.

Q. Have you assessed the sales tax against the Building and Loan Commissioner, the Superintendent of Banks, and the Insurance Commissioner—I am referring now to the State officers of the State of California—on sales made by those officials for the purpose of liquidating the assets of corporations taken over by those designated officials for the purpose of liquidation?

Mr. Bowden: We object to that on the ground it is immaterial.

The Referee: The same ruling; you may answer.

The Witness: I am sure we have assessed and collected taxes from the Building and Loan Commissioner. I would like to refresh my memory regarding the Insurance Commissioner and the Superintendent of Banks.

Q. (By Mr. Stevens): Has the Building and Loan Commissioner reported and paid such sales tax upon such sales? [31]

A. Yes, sir.

The Referee: In other words, all of the State agencies bow to the majesty of the State law and pay it, is that your answer?

(No answer by the witness.)

Q. (By Mr. Stevens): How are your adminis-

(Testimony of John J. Campbell.)

trative instructions, Mr. Campbell, applicable to the facts in this case?

Mr. Bowden: Objected to on the ground it has already been asked and the objection was sustained.

The Referee: Yes, sir. I won't let this gentleman usurp my functions. I get the first guess on this and then the Supreme Court of the United States will decide it if you gentlemen don't get discouraged.

Mr. Stevens: I will offer to prove by this witness in answer to that question he would testify that under either of the two theories previously mentioned in the offer of proof made in response to the question, "What are those instructions?" that in this case the auditor finds that forty-four sales of tangible personal property have been made by the Trustee in bankruptcy; that thirty-two of such sales are retail sales, or in other words, sales to ultimate consumers or for purposes other than resale; that twelve of such sales are sales for resale and that nine of the forty-four sales are of cabinets or cupboards which were manufactured in the course of the Bankrupt's business; that under [32] the first theory the auditor finds that the Trustee has applied for a sales tax permit to engage in the sale of tangible personal property in the State of California and that pursuant to that seller's permit the Trustee has made a number of sales of the stock in goods of the bankrupt retailer. Consequently, under the first theory, when the auditor finds that sales were made of equipment and machinery used in connection with the operation of the bankrupt's retail business the

(Testimony of John J. Campbell.)

auditor applies the tax to the sale of such equipment and machinery. Under the second theory the administrative instruction would be applicable because of the fact that forty-four sales were made during the period which the Trustee held a seller's permit issued by the State Board of Equalization and that thirty-two retail sales made are sufficient in number, scope, and character to constitute the Trustee a seller within the meaning of the Sales Tax Law.

The Referee: Is that the end?

Mr. Stevens: That is the end.

The Referee: The motion is denied. The testimony is denied. I will not let any witness interpret the law. I will make my ruling and then you can see who is right.

(A short recess was had at this point.)

Q. (By Mr. Stevens): Mr. Campbell, I show you a document headed "State Board of Equalization, Office Correspondence, dated June 10, [33] 1941, from Sacramento, California, to Headquarters and Field Staff, Sales Tax Division, from T. H. Mugford, re: Ruling 79, Final Returns, New Permits," and ask you if you can identify that document?

A. Yes, sir. I am familiar with this document. These instructions were sent out to the district offices regarding the procedure for filing returns in cases of administrators or anyone who was a decedent's representative, to the effect that the executor or administrator only cleared up the business and did not continue to operate the business and that he

(Testimony of John J. Campbell.)

would not be required to apply for a new sales tax permit. If, on the other hand, the executor or administrator desired to continue the business then the permit of the decedent was required to be closed out and a new permit issued to the executor or administrator covering the business that he was going to continue.

Mr. Bowden: Now, just a moment, please. I move that the last portion of the witness' answer be stricken as not responsive and on the further ground that the document he holds in his hand is the best evidence of what it is supposed to be. I did not realize that he was going to recite what is in that document.

Mr. Stevens: I think that is all.

The Referee: I think it is literally true that the document speaks for itself.

Mr. Stevens: I think it does, Your Honor. [34]

The Referee: Very well.

Mr. Stevens: I would like to offer this as an exhibit on behalf of the State Board of Equalization.

Mr. Bowden: We object on the ground it is incompetent, irrelevant and immaterial.

The Referee: I am going to sustain the objection. It is merely an interpretation of the State Board. We have here a question of law.

Mr. Stevens: May this be marked for identification, Your Honor?

The Referee: I don't see what theory an instruction given by the State officials would settle a Federal law. We all have different ideas as to what the

(Testimony of John J. Campbell.)

law is about. That is the reason I have to buy law books and that is the reason you have to buy law books—because the courts differ. These gentlemen in Sacramento have one theory and they give certain instructions. Now, whether or not that is determinative of the law, I can't see it. I will mark this for identification.

(The document was marked Board's Exhibit No. 1 for identification.)

Mr. Stevens: This administrative construction is not an attempt to apply the Federal law. It is an attempt to apply the sales tax law and they have to do that before they can apply the tax law. They have to have some instructions. [35]

The Referee: These gentlemen put certain interpretations on it and then it finally remains for the courts of the State to determine whether or not they are correct.

Mr. Stevens: Yes, Your Honor, we agree with that.

The Referee: All right, sir.

Q. (By Mr. Stevens): Have you any other written memoranda, instructions or correspondence which indicates the Board's administrative practice with respect to sales in liquidation? A. I have.

Q. What have you?

A. I have a copy of a letter written to Lieb and Lieb on August 11, 1943.

Q. From whom?

A. From E. H. Stetson, Associate Tax Counsel, State Board of Equalization, setting forth—

(Testimony of John J. Campbell.)

Mr. Bowden: Now, we object to the witness testifying from what is in the document. It speaks for itself.

The Referee: I think that is correct.

Q. (By Mr. Stevens): Is that a copy of a letter which was mailed from the Board to the firm of Lieb and Lieb in San Jose, California? A. Yes, sir.

Mr. Bowden: I won't object on the ground it is a copy. I don't want to have any technical objections here. [36]

The Referee: The courts have held it is a carbon original. That is the last pronouncement.

Mr. Bowden: Counsel can offer it.

Mr. Stevens: At this time I will offer the letter as an exhibit in support of the position of the State Board of Equalization.

Mr. Bowden: I object on the ground it is immaterial, incompetent, and irrelevant. It would not tend to prove——

The Referee: I don't know what it is yet. It might be congratulations on the birth of twins.

Mr. Bowden: I think the Court will have to read it in order to pass on the objection.

The Referee: Yes.

Mr. Stevens: I am sorry (handing document to the Referee.)

The Referee: Mr. Bowden, I think I will admit it for what it is worth. I don't think it proves anything. It says that if a man has two cases of whiskey and sells them as a whole there will be no tax. I will admit it for identification. I don't think it

(Testimony of John J. Campbell.)

has any probative value, but I will admit it for that purpose. Again, it is merely the interpretation of the State Board of Equalization.

Mr. Stevens: That is all it is offered for, merely the State Board's interpretation of the Act. That is the only purpose for the offer.

The Referee: All right, sir. [37]

(The document was marked Board's Exhibit 2 for identification.)

Q. (By Mr. Stevens): Mr. Campbell, I show you what appears to be a carbon copy of a letter to the firm of Hahn and Hahn, Suite 808 Pacific Southwest Building, Pasadena, California, signed by what appears on the carbon as R. W. B., Assistant Sales Tax Counsel, dated December 6, 1934, and ask you if you can identify this copy?

A. Yes, sir. This is a copy of a letter which was forwarded to Hahn and Hahn.

Q. On or about December 6, 1934?

A. Correct.

Mr. Stevens: I would like to offer that for the same purpose.

Mr. Bowden: We object on the ground it is incompetent, irrelevant and immaterial.

The Referee: I will admit it for identification. It may be persuasive somewhere.

(The document was marked Board's Exhibit 3 for identification.)

Mr. Stevens: That is all the questions I have of this witness.

(Testimony of John J. Campbell.)

The Referee: Any questions, Mr. Bowden?

Mr. Bowden: No questions, Your Honor.

The Referee: That is all, Mr. Campbell. [38]

(A short interruption at this point.)

Mr. Stevens: I have here a stipulation of facts which I have prepared to be signed by the State Board of Equalization by me as its attorney and the Trustee through Mr. Bowden. In our conversations last night I had understood that certain of these facts would be stipulated to. I am not prepared to prove them at this time. I think Mr. Bowden is prepared to stipulate that they are true facts, but he is not prepared to stipulate that they are material. I am just wondering, Mr. Bowden, if it would be better for me to go through these statements sentence by sentence and then if you are prepared to stipulate that they are facts, you can at that time make your objection to their materiality if you so desire.

Mr. Bowden: I will stipulate they are facts, but I will not stipulate they are competent evidence in this case.

The Referee: All right, sir.

Mr. Stevens: I have these in written form, your Honor. I think it would simplify things if I would give it to the reporter and have it copied into the record.

Mr. Bowden: We would have to have a ruling on the admissibility.

Mr. Stevens: May I give it to Your Honor to read?

The Referee: I will read it during the noon hour. Will you be back this afternoon?

Mr. Stevens: I don't think Mr. Bowden is ready to [39] proceed this afternoon.

The Referee: I will read this and reserve my ruling until you resume the hearing.

Mr. Stevens: In any event it will be stipulated those are the facts.

Mr. Bowden: Yes, it is stipulated those are the facts, but it is objected to as evidence on the ground it is incompetent, irrelevant, and immaterial, and does not prove or disprove any evidence in the case.

The Referee: You admit the statements are true?

Mr. Bowden: That is correct.

The Referee: But you deny they are pertinent?

Mr. Bowden: That is correct.

The Referee: When do you want to resume this contest?

(Discussion in re. adjournment omitted.)

(Hearing adjourned until November 14, 1946, at 10:00 a.m.)

(Following is a Stipulation of Facts referred to above and entered into between the State Board of Equalization and the Trustee herein through their respective counsel:)

“During the period from November 1, 1945, to February 5, 1946, West Coast Cabinet Works, Inc., a corporation (hereinafter referred to as the bankrupt) was engaged in the business of selling tangible personal property at retail in the State of California, under Seller's permit [40] No. AL-30146 issued

by the State Board of Equalization of the State of California (hereinafter referred to as the Board), pursuant to provisions of Sections 6066, 6067, and 6068 of the Revenue and Taxation Code of the State of California. During said period the bankrupt filed with the Board sales tax returns and reported and paid sales tax on the taxable sales so reported, pursuant to the provisions of Sections 6451, 6452, 6453 and 6454 of the Revenue and Taxation Code of the State of California.

“On February 5, 1946, the bankrupt filed a petition under Chapter 11, Section 322 of the Bankruptcy Act proposing a plan of arrangement with its creditors; on said date George T. Goggin was appointed receiver of said debtor in said proceeding. On February 26, 1946, at the first meeting of creditors, under Chapter 11, Section 322 of the Bankruptcy Act, the creditors of said bankrupt nominated George T. Goggin as trustee of the estate of said bankrupt in the event it should be necessary to administer the estate in bankruptcy, and the order of Hugh L. Dickson, Referee in Bankruptcy, was entered approving his nomination as trustee in such an event.

“In accordance with the provisions of Sections 6066 and 6067 of the Revenue and Taxation Code of the State of California, George T. Goggin, as receiver of West Coast Cabinet Works, Inc., applied to the State Board of Equalization for a seller's permit to engage in the business [41] of selling tangible personal property and was issued Seller's Permit No. AG-27329 for said purpose by

the Board, pursuant to Section 6068 of the Revenue and Taxation Code of the State of California. During the period from February 5, 1946, to and including March 11, 1946, George T. Goggin, as receiver of West Coast Cabinet Works, Inc., engaged in the business of selling tangible, personal property at retail in the State of California and filed with the Board sales tax returns and reported and paid sales tax on the taxable sales so reported pursuant to the provisions of Sections 6451, 6452, 6453 and 6454 of the Revenue and Taxation Code of the State of California.

“On March 12, 1946, West Coast Cabinet Works, Inc., was adjudicated bankrupt and George T. Goggin was appointed trustee of said bankrupt’s estate.

“In accordance with the provisions of Sections 6066 and 6067 of the Revenue and Taxation Code of the State of California, George T. Goggin, as trustee of said bankrupt, applied for a seller’s permit to engage in the business of selling tangible, personal property in the State of California and was issued Seller’s Permit No. AG-27844 for said purpose by the Board, pursuant to Section 6068 of the Revenue and Taxation Code of the State of California. During the period from March 12, 1946, to May 1, 1946, George T. Goggin, as trustee for said bankrupt, was engaged in the sale of tangible, personal property at retail in the State of [42] California and filed with the Board, sales tax returns and reported and paid sales tax on the taxable sales so reported in said returns, pursuant to the provisions of Sections 6451, 6452, 6453 and 6454 of the

Revenue and Taxation Code of the State of California. The Board was not satisfied with said returns and, pursuant to the provisions of Section 6481 of the Revenue and Taxation Code of the State of California, the Board made an additional determination against said trustee for said period based upon information within its possession of tax in the amount of \$268.20, together with interest in the sum of \$8.04, for a total amount of \$276.24. On or about September 13, 1946, the Board served written notice of such assessment upon said trustee by mail, pursuant to the provisions of Section 6486 of the Revenue and Taxation Code of the State of California.

“Said Trustee did not file petition for redetermination with the Board within 30 days after service upon him of said notice of determination.

“Said trustee did not pay the tax and interest assertedly due under said determination within 30 days after the service upon him of the notice thereof and, pursuant to the provisions of Section 6565 of the Revenue and Taxation Code of the State of California, the Board imposed a penalty of 10 per cent of the amount of said tax in the sum of [43] \$26.82.”

Thursday, November 14, 1946, 10 A.M.

The Referee: West Coast Cabinet Works, Inc.

Mr. Stevens: Ready, your Honor.

Mr. Bowden: Ready, your Honor.

Mr. Stevens: I would like to call Mr. Trezise to the stand.

GEORGE E. TREZISE

called as a witness on behalf of the Board, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Trezise, are you an officer of the West Coast Cabinet Works? A. I am.

Q. The Bankrupt in this proceeding?

A. Yes.

Q. What office? A. Secretary.

Q. Referring to the five trucks which were among the assets of the Bankrupt and which were sold by Mr. Goggin in open court on March 29, 1946,—I will identify those more particularly, now: One of them being a 1936 Chevrolet 6 Pick-up Truck M. No. 6462026; a 1945 Chevrolet 6 Stake Truck Mo. No. BG-792418; a 1945 Chevrolet 6 Stake Truck M. [44] No. BG-782397; a 1945 Chevrolet 6 Stake Truck M. No. BG-790983; and a 1946 Chevrolet 6 Special Body Truck M. No. BG-809067,—and I will ask you to state for what purpose those trucks were used in the business of the West Coast Cabinet Works, Inc.?

Mr. Bowden: I object to that on the ground it is immaterial. It does not tend to prove or disprove any issues in this case.

The Referee: I will hear it. You may answer.

The Witness: The trucks mentioned were used for the hauling from the two different plants of cabintes to various builders in Southern California

(Testimony of George E. Trezise.)

and also they were used in hauling different parts and machinery from the Long Beach plant to the Burbank plant.

Q. (By Mr. Stevens): Were they used for delivery purposes of cabinets sold by West Coast Cabinet Works, Inc.? A. That is right.

The Referee: That is, prior to bankruptcy?

The Witness: That is right.

Q. (By Mr. Stevens): Have you any knowledge of their use after bankruptcy? A. No.

Mr. Stevens: I have no further questions.

Mr. Bowden: No questions. [45]

The Referee: All right, you may stand aside.

Mr. Stevens: Is Mr. Goggin here?

Mr. Goggin: Yes, sir.

Mr. Stevens: Will you please take the stand?

GEORGE T. GOGGIN

called as a witness on behalf of the Board, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Goggin, you were first appointed receiver of the West Coast Cabinet Works, Inc., under a Chapter XI proceeding, were you not?

A. Yes, I believe so.

Q. And as Receiver you continued the business of the West Coast Cabinet Works, Inc.?

A. Well, I will explain it this way. When I took

(Testimony of George T. Goggin.)

over the plant the operations had ceased. There was on hand certain orders and contracts for manufacturing and delivering of certain wooden cabinets. In making a survey of the materials on hand we found that they could be assembled to complete a portion of the orders. The price, however, was such that it did not appear that a profit could be made if the orders were completed under the contracts made by the Bankrupt. So we contacted the contractors or purchasers in order to have the prices increased by twenty-five [46] per cent, and then we completed certain orders.

Q. You applied for a sales tax permit from the State Board of Equalization, a Seller's Permit, did you not? A. Yes, sir.

Q. And you secured such a permit, is that right?

A. Yes, sir.

Q. And you filed with the State Board of Equalization a return showing taxable sales and sales for resale which were made during the period of your operation as Receiver?

A. Yes. Now, with respect to those returns, they were prepared by the representative of the State Board of Equalization. I believe it was Mr. Lilly, in connection with Mr. Butcher.

Q. Who is Mr. Butcher?

A. He was an agent of mine; he was employed by me. Those returns were submitted and I signed the same and paid the tax in relation thereto. However, one statement was rendered which incorporated a sale of certain automobiles or trucks which I sold in open court in the liquidation of the assets,

(Testimony of George T. Goggin.)

and I refused to sign that return. Accordingly, it was modified and those items were removed from the return and that final return was signed by me.

Q. The sale of those trucks was not, however, made by you during your operation as Receiver?

A. No.

Q. I am asking you about your operation as Receiver. [47]

A. They are both tied in together and it is hard to distinguish between the two administrations.

Q. You were appointed Trustee and took office as of March 12?

Mr. Bowden: No, not Trustee.

Mr. Stevens: March 12, 1946.

Mr. Bowden: What was the date of the appointment of the Receiver?

Mr. Stevens: Of the Receiver?

Mr. Bowden: Yes.

Mr. Stevens: February 5, 1946.

Mr. Goggin: Well, I don't have the dates before me. If you say that is the date, I guess it is.

Mr. Stevens: Those are the dates according to my notes, at least.

The Referee: February 5, 1946, you were appointed Receiver. The first meeting of creditors was February 26—no. You were appointed Trustee in the event of liquidation. On March 12 there was an order of adjudication entered. Mr. Goggin became Trustee and filed his bond on March 12, 1946.

Q. (By Mr. Stevens): After you became Trustee of the West Coast Cabinet Works, Inc., you con-

(Testimony of George T. Goggin.)

tinued your operation of the business to the extent described by you, did you not?

A. That is correct. [48]

Q. And you again applied for a Sales Tax Permit from the State Board of Equalization?

A. As Trustee?

Q. As Trustee.

A. I don't recall, but probably so.

Mr. Bowden: Is that a fact? Do you know whether or not he did?

Mr. Stevens: Yes, he did apply. We have a copy of a signed application.

The Witness: At least I made a return as Trustee.

Mr. Stevens: As a matter of fact, you were issued a permit as Trustee, is that not correct?

The Witness: I believe that is correct.

Q. (By Mr. Stevens): I am going to show you one of the Board's copies and see if this will refresh your recollection of the facts as they existed at that time.

A. Yes, I signed that.

Q. And you do now recall you were also issued a permit for the purpose of making sales under the Retail Sales Act of the State of California?

A. Yes, sir.

Q. And you filed a return under the Sales and Use Tax law reporting certain of your sales as taxable sales and certain of your sales as sales for resale, the gross receipts from which would not be subject to the tax? [49]

(Testimony of George T. Goggin.)

A. Yes, as the same were prepared again by Mr. Lilly of your office and Mr. Butcher.

Q. And signed by you?

A. And signed by me.

Q. During the period of your operation of the business on March 29, 1946, you sold the five trucks—

Mr. Bowden: Just a minute. Are you through?

Mr. Stevens: No.

Mr. Bowden: Oh. Don't answer, Mr. Goggin, until I make my objection.

Q. (By Mr. Stevens): On March 29, 1946, you sold five trucks which were part of the assets of the West Coast Cabinet Works, Inc.?

Mr. Bowden: Mr. Reporter, will you read that question. (Question read as above recorded.) Part of the question before that, I believe, he started out, during the operation of the business. (Previous question read.)

We object on the ground it is leading and suggestive and assumes a point not in issue, if the Court please.

The Referee: I think he is trying to elicit the facts.

Mr. Bowden: He said during the operation of the business he sold these trucks. That is for the Court to find.

Q. (By the Referee): Mr. Goggin, were you operating this business after [50] you became Trustee?

A. I think, Your Honor, just for a short time,

(Testimony of George T. Goggin.)

maybe a week or two in completing the building of two or three kitchen cabinets.

Q. Were you operating the business on the date you sold these five trucks?

A. I doubt it. I don't think there was any actual operation. The mechanical part of assembling the wooden cabinets and the use of hammers and nails, I think, ceased prior to the time I sold the trucks.

Now, the sale of the trucks was had in this manner. According to the rules of court, I advertised the sale in the Los Angeles Daily Journal five days prior to this sale in open court. The matter came up for hearing and there were competitive bids and the trucks were sold to various persons who were the highest and best bidders for the equipment. I filed a petition and obtained an order confirming the sale of those items. They were not sold as part of my operations of the business as such, but were sold in the liquidation of the assets.

Mr. Stevens: I move to strike the last statement.

The Referee: It is a conclusion. It will go out, and I will draw the first conclusion and see whether or not I am right if it goes up.

Q. (By Mr. Stevens): In order to refresh your recollection, Mr. Goggin, [51] I would like to call your attention to reports filed by you in this proceeding for the period during which you operated this business.

The Referee: Here are the files.

Q. (By Mr. Stevens): Calling your attention to the First Report and Account of Trustee, Petition

(Testimony of George T. Goggin.)

to Pay Expenses of Administration and Petition for Dividend, which was filed on July 17, 1946, in this proceeding, I refer to the statement beginning on line 29 of page 1 of that report, in which you say:

“That your Trustee caused the inventory to be completed of all the machinery, equipment, office furniture, fixtures, and other incidentals.”

A. What page is that on?

Q. Page 1, paragraph 3. A. Yes, sir.

Q. “That your Trustee attended various meetings in court, conferred with numerous persons with respect to the purchase and sale of cabinets and scrap lumber, etc., and was authorized by the Court to continue the operation and to sell the incidental merchandise; that your Trustee advertised certain of the office furniture and woodworking equipment and miscellaneous machinery for sale which was inventoried at prices at approximately \$7,959.75; that the said matter came up for hearing and the highest and best offer received therefor was the sum of \$5,600; that the [52] Court confirmed the said sale. However, your Trustee conferred with the purchasers thereof who were speculators and auctioneers and arranged for an auction of said property rather than having the sale confirmed; . . . that your Trustee also conducted a sale of certain trucks which amounted to a sum in excess of \$10,000.” You attach to your report Exhibit A showing receipts and in which you itemize the sales of cupboard cabinets, scrap pieces of lumber, kegs of nails, handles, hardware, and catches, a blower, and

(Testimony of George T. Goggin.)

a motor, a set of tile equipment, and two shop desks.

Mr. Bowden: What page are you reading from, Mr. Stevens?

Mr. Stevens: Most of those items were taken from page 2 of Exhibit A, and on page 3 of Exhibit A is reported a sale of plumbing pipe, roofing paper——

The Referee: Weren't all of those items tax paid, Mr. Stevens?

Mr. Stevens: Practically all of those were——

The Referee: Then why devote so much time to them if taxes were paid? Why not get down to the five trucks?

Mr. Stevens: I just want to refresh Mr. Goggin's recollection to see if this serves to refresh it as to the period in which he continued the operation of this business.

Q. Mr. Goggin, in view of these facts contained in your petition I will now ask you whether or not you did [53] not, as a matter of fact, continue the operation of the business of the Bankrupt subsequent to April 29, 1946?

A. April 29, is that the question?

Q. After March 29, 1946.

A. On April 23 I completed the sale to Builders' Control Service of certain cabinets for \$205.59. Also on May 14 I completed a sale to Wm. H. Cochrane Company of certain cabinets for \$133.60. Those are the only two jobs that were completed after the date that you have mentioned.

Q. You made a statement earlier this morning

(Testimony of George T. Goggin.)

that you made the sales of these trucks in liquidation of the business of the Bankrupt. How do you distinguish these sales from the sales of the motor and blower which you sold on March 12, 1946, to Window Shade Products Company?

Mr. Bowden: We object on the ground it calls for a conclusion. He is not required to distinguish.

The Referee: Objection sustained. I think that is an invasion perhaps of the province of the Court. Let me have the facts and I will draw the conclusions.

Q. (By Mr. Stevens): Did you not sell on March 12, 1946, to D. M. Townsend and Roy H. Alward a Davis and Wells spindle boring machine——

A. What was that date, Mr. Stevens?

Q. March 12, 1946.

A. What item was that? [54]

Q. A Davis and Wells boring machine with a Reuland motor. A. Yes.

Q. And to the same parties you sold an Irvington swing saw with table? A. Yes.

Q. And a Craftsman belt sander with Peerless motor? A. Yes, sir.

Q. And assorted wood-push-around hand trucks?

A. Yes, sir.

Q. You reported that sale in your return as a retail sale and paid a tax measured by the gross receipts from that sale? A. That item——

Q. Will you please answer yes or no and then explain it?

A. Yes, I probably did. If it is down on the

(Testimony of George T. Goggin.)

report, which I assume it has been, that that item was reported by your Mr. Lilly and submitted to me for signature, and I did not check the items.

I believe personally that there should not have been a tax paid upon the sale of any capital assets, and that was a capital asset.

Q. Our auditor went over the books with your Mr. Butcher, did he not?

A. Apparently so. [55]

Q. Also, on March 12, 1946, did you not sell to Window Shade Products Company a Bental Margeant 18" rip saw with General Electric 10 H. P. motor?

A. Yes, sir.

Q. And to the same company on that date did you not sell an American 12" sticker with a General Electric 20 H.P. motor?

A. Yes, sir.

Q. And to the same party on the same date a 24" Blower with U.S. 5 H.P. motor?

A. Yes, sir.

Q. With respect to those sales did you not report them as retail sales in your sales tax return filed with the State Board of Equalization and pay a sales tax measured by the gross receipts from those sales?

A. I don't have the return, but if you say so, apparently I did.

Again with the understanding that this report was also prepared by Mr. Lilly of your office and I signed the same, and I believe also that any tax paid on that item was paid in error and should be returned, it being a capital asset.

Mr. Stevens: I move to strike that.

The Referee: It will go out, sir. I will conclude:

(Testimony of George T. Goggin.)

whether or not that is right or wrong. Don't worry about conclusions from these witnesses. I will take care of them. [56] I know a conclusion from a statement after forty years of practice. All right, sir, what is the next question?

Q. (By Mr. Stevens): On March 15, 1946, did you make a sale of Plywood to Gregg and Gedney in the amount of \$74.50? A. Yes, sir.

Q. And did you report that sale as a retail sale in your sales tax return filed with the State Board of Equalization and pay the tax measured by the gross receipts from that sale?

A. Apparently so. And I will make the same explanation with respect to that item as I did on the others.

Q. On March 19, 1946, did you sell one lot of lumber, scrap pieces, to D. M. Townsend and Louis Lampe in the amount of \$40? A. Yes, sir.

Q. Did you report that sale in your sales tax return filed by you as Trustee with the State Board of Equalization and pay the tax measured by the gross receipts from that sale?

A. Apparently so, and again with the same explanation as in the previous answer.

Mr. Bowden: I don't like to limit this examination, if the Court please, but I think we are wasting time. Counsel is reading from the report of the Trustee which shows what he did. What difference would it make how many [57] taxes he paid. The question is does he have a liability for this particular tax. His conduct in connection with the State

(Testimony of George T. Goggin.)

Board of Equalization in filing his return would have no bearing on his liability for the tax.

Q. (By Mr. Stevens): I think I can hurry it up in this fashion. With respect to the sale of everything other than tangible personal property, other than cupboards reported by you in your report as Trustee and returned by you in your sales tax return——

Wait a minute. I got the answer in there before I finished asking my question.

Will you not admit, Mr. Goggin, that you made those returns and reported them in your sales tax return for the period in which you were Trustee with the exception of the five trucks which were sold on March 29, 1946?

Mr. Bowden: Do you understand the question, Mr. Goggin?

The Witness: Yes.

Mr. Bowden: Well, I don't. I just wondered if you did.

The Witness: With the exception of the trucks and with the exception of the sale conducted at public auction by Milton Wershow, for which he received \$8,768.35, I believe the answer would be yes.

Q. (By Mr. Stevens): As a matter of fact, Mr. Goggin, you did report in your return the sales to Mr. Wershow as sales for resale which were not subject to the tax? [58]

A. I believe that is correct.

Mr. Stevens: That is all.

(Testimony of George T. Goggin.)

Cross-Examination

By Mr. Bowden:

Q. Regarding these five trucks that we have been talking about, state what you did prior to selling same and up to the conclusion and confirmation of the sale by the Court?

A. I was appointed Receiver and took over the physical assets of the Bankrupt, which consisted of various machinery and equipment, together with these certain trucks. The trucks were not used and were stored during my administration, both as Receiver and as Trustee. After the order of adjudication was entered and I was appointed Trustee, the trucks together with the other capital assets were inventoried and the inventory was filed with the Court. The Court appointed an appraiser and the same were appraised. I then advertised in the Los Angeles Daily Journal the sale of the said trucks, that the sale would be conducted in open court before Referee Dickson and would be sold to the highest bidder subject to the approval of the Court; that at the time of the return or on the return date I announced the sale and sold the trucks separately. There was competitive bidding and they were sold to the highest bidder. I then prepared a petition and return of sale and I obtained a [59] court order confirming the same and delivery of the trucks was made upon receipt of the purchase price.

Q. To the parties who were the highest bidders in court at the time of the sale, is that correct?

(Testimony of George T. Goggin.)

A. That is correct.

Mr. Bowden: That is all.

Redirect Examination

By Mr. Stevens:

Q. You did file your returns as Trustee for the period from March 12, 1946, to and including April 30, 1946, did you not, Mr. Goggin?

A. Isn't it beyond that date? Yes, I did, up to that date, at least.

Q. As a matter of fact, you have received a fee from this Court, approved by the Referee, for operating the business, in the amount of \$500, is that right?

Mr. Bowden: Objected to on the ground it is immaterial.

The Referee: The record speaks for itself. You have it right before you. I take cognizance of all of my official files. The objection is sustained.

Q. (By Mr. Stevens): Can you give us the figure, the total amount received by you from the sale only of cabinets?

Mr. Bowden: I object on the ground it is immaterial.

The Referee: Objection sustained. He has paid the taxes [60] on those sales and I am not going to go any further into the matter. Confine yourself to the trucks. That is what you are fighting about.

Mr. Stevens: That is all.

Mr. Bowden: That is all.

The Referee: I find there is no liability for sales tax on these trucks.

Mr. Bowden: Before the Court rules, I have one stipulation I would like to have in the record, please.

The Referee: What is it?

Mr. Bowden: Mr. Stevens, will you stipulate the State Board of Equalization has not filed a claim in this proceeding for the tax claimed due under the sale of these five trucks?

Mr. Stevens: Yes, I will so stipulate.

The Referee: All right, sir. The ruling will be there is no tax liability here. You may draw findings to that effect.

Mr. Bowden: And the injunction will be issued, if the Court please?

The Referee: Yes, sir.

Mr. Bowden: I will prepare the order. [61]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, hereby certify that the foregoing pages comprise a true and correct transcript of the testimony given in the above entitled matter.

Dated this 20th day of November, 1946.

/s/ BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed Nov. 1, 1950 U.S.C.A.

CLERK'S CERTIFICATE

United States of America

Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Order to Show Cause; Stipulation and Order; Amended Petition for Order to Show Cause; Injunction; Petition of State Board of Equalization for Review of Referee's Order by Judge; Referee's Certificate on Review; Order re Amendment of Referee's Certificate; Stipulation and Board's Exhibits 1, 2 and 3; Opinion; Objections to Proposed Findings; Proposed Findings Pursuant to Objections Heretofore Filed; Findings of Fact and Conclusions of Law and Order Denying Petition to Review, all in the Matter of West Coast Cabinet Works, Inc., Debtor, No. 44249-W-Bankruptcy, as the same appears from the original record remaining in my office.

Witness my hand and seal of said Court, this 17th day of October, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: No. 12727. United States Court of Appeals for the Ninth Circuit. California State Board of Equalization, Appellant, vs. George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

ORDER GRANTING PETITION FOR
ALLOWANCE OF APPEAL

The California State Board of Equalization petitions, pursuant to Section 24(a) of the Bankruptcy Act, 11 U.S.C. §47(a), for the allowance of an appeal from an order of the United States District Court for the Southern District of California, Central Division, entered on October 5, 1950, denying the Board's petition for review of an order entered by the referee enjoining the Board from enforcing provisions of the California Sales and Use

Tax Law with reference to sales of five trucks by the trustee in bankruptcy.

The petition is granted and the appeal is allowed.

WILLIAM DENMAN,
Chief Judge.

WALTER L. POPE,
Circuit Judge.

[Endorsed]: Filed Nov. 21, 1950.

PAUL P. O'BRIEN,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit
No. 12727

CALIFORNIA STATE BOARD OF
EQUALIZATION,

Petitioner,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of WEST COAST CABINET
WORKS, INC.,

Respondent.

PETITION FOR LEAVE TO APPEAL UNDER
SECTION 24(a) OF THE BANKRUPTCY
ACT

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Petition of the California State Board of Equalization respectfully represents:

1. That on the 5th day of October, 1950, an Order was entered by the Honorable Jacob Weinberger, one of the Judges of the United States District Court, for the Southern District of California, in a certain proceeding in bankruptcy wherein the California State Board of Equalization was petitioner for review of an Order made and entered by the Honorable Hugh L. Dickson, Referee in Bankruptcy, and wherein George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc., was respondent. The said Order of October 5, 1950, denied the Petition of the California State Board of Equalization for review of the Order entered by the Honorable Hugh L. Dickson, Referee in Bankruptcy, on the 9th day of December, 1946, permanently enjoining the California State Board of Equalization from enforcing against the trustee in bankruptcy or the bankrupt estate herein any of the provisions of the California Sales and Use Tax Law with reference to sales of five trucks by said trustee on March 29, 1946. (C. T. 144.)

2. West Coast Cabinet Works, Inc., a corporation, was formerly engaged in the business of manufacturing and selling cabinets. Prior to the commencement of proceedings in the Bankruptcy Court, that corporation filed the returns and paid the tax required by the California Sales and Use Tax Law. On February 5, 1946, the corporation

filed a petition under Chapter XI of the Bankruptcy Act, and George T. Goggin was appointed receiver and authorized to conduct the corporation's business and to sell the same as a going concern. As such receiver, Mr. Goggin applied to the California State Board of Equalization (the State agency charged with the administration and enforcement of the provisions of the California Sales and Use Tax Law) for a seller's permit to engage in the business of selling tangible personal property, and the permit was duly issued to him. On March 12, 1946, West Coast Cabinet Works, Inc., was adjudicated bankrupt and George T. Goggin was authorized to continue his conduct of the corporation's business as trustee in bankruptcy. In this latter capacity Mr. Goggin again applied for and obtained a permit to engage in the business of selling tangible personal property.

Subsequent to Mr. Goggin's appointment as trustee in bankruptcy, on March 12, 1946, and to and including May 14, 1946, Mr. Goggin made numerous sales of tangible personal property. Most of these sales were retail sales, although some of them were sales for resale (R. T. 17-18a), and, with the exception of five sales on March 29, 1946, were duly reported by Mr. Goggin on returns filed with the California State Board of Equalization under the California Sales and Use Tax Law. (R. T. 15, 18.) It is to be noted that Mr. Goggin manufactured and sold cabinets (a continuation of the business of the bankrupt) as late as May 14, 1946 (R. T.

18a), although it appears that an Order was made by the Referee on March 22, 1946, directing Mr. Goggin to sell the assets of the bankrupt estate either at public auction or private sale. (C. T. 39.)

3. On or about October 3, 1946, Mr. Goggin filed a Petition for an Order to Show Cause directed to the California State Board of Equalization. This petition was amended pursuant to stipulation of counsel dated November 31, 1946 (apparently October 31, 1946—C. T. 3; R. T. 2), the amended petition praying for the issuance of an Order directing the State Board of Equalization to appear and show cause why it should not be permanently restrained and enjoined from attempting to enforce any of the provisions of the California Sales and Use Tax Law or rules and regulations relating thereto, against Mr. Goggin, the trustee, in connection with the aforesaid five unreported sales made on March 29, 1946. It is clear from the amended Petition for Order to Show Cause that the sales on March 29, 1946, consisted of sales in open court of five automotive vehicles and that the total selling price amounted to \$10,875.00; that on or about September 11, 1946, the California State Board of Equalization duly determined, in the manner provided for by the California Sales and Use Tax Law, that the trustee herein was indebted to it in the sum of \$276.24 in connection with the aforementioned sales on March 29, 1946; and that included in said determination was the ten per cent penalty provided for by the

California Sales and Use Tax Law for failure to report sales made. (C. T. 5, 6.) It is clear that notice of the aforesaid determination was duly mailed to the trustee herein as provided for by the California Sales and Use Tax Law; that the determination (assessment) became final, no petition for redetermination having been filed as provided for by the California Sales and Use Tax Law; and that no claim was filed with this Court by the California State Board of Equalization relating to the aforesaid tax determination. (C. T. 6, 10; R. T. 61.)

Paragraph 5 of the amended Petition for Order to Show Cause merely discloses the trustee's belief that neither he nor the bankrupt estate are required to comply with the California Sales and Use Tax Law insofar as the aforesaid sales on March 29, 1946, are concerned, and paragraph 6 contains merely the bald assertion that unless an injunction is issued enjoining the California State Board of Equalization from attempting to collect any tax in connection with the aforesaid sales of March 29, 1946, the California State Board of Equalization will continue to assess penalties against the trustee herein and will endeavor to enforce all of the penal provisions against him as provided for by the California Sales and Use Tax Law. (R. T. 6.) It should be noted at this point that reference to the entire record herein, namely, the Reporter's and Clerk's transcripts, fails to disclose any evidence whatsoever that the Board had, would have, or intended to enforce penal provisions against the trustee herein, or that the Board would in any way have

interfered with the administration of the instant estate or the trustee's possession of the assets of the estate.

4. The Order to Show Cause signed by the Referee on October 3, 1946, ordered the various members of the California State Board of Equalization to appear before him on October 24, 1946, and then and there show cause why a permanent injunction should not be issued against them enjoining and restraining them, and each of them, from enforcing any of the provisions of the California Sales and Use Tax Law against the trustee herein, and further ordering that the Order to Show Cause might be served by deposit in the mail. (C. T. 1.)

5. On October 31, 1946, and November 14, 1946, trustee's aforesaid amended Petition duly came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, to whom the said bankruptcy proceeding had been duly referred, and on December 9, 1946, the said Referee entered an Order granting the prayer of said amended Petition. (C. T. 9-11.) The Court's attention is again directed to the Referee's finding that the California State Board of Equalization had filed no claim in the bankruptcy proceeding for the taxes in question. (C. T. 10.)

6. Thereafter, on or about January 7, 1947, the California State Board of Equalization duly filed its Petition for Review of the said Order of the Referee and its Petition came on for hearing on

the certificate of the Referee filed in said District Court on or about February 19, 1947. Upon said hearing, the said Judge of said District Court, on the 5th day of October, 1950, entered an Order dismissing said Petition for Review and confirming the Order entered by the Referee.

7. The Order of the Honorable Jacob Weinberger, Judge of the District Court, entered October 5, 1950, denying the Petition of the California State Board of Equalization for review of the Referee's Order of December 9, 1946, is erroneous in numerous respects and predicated upon a factual situation not in accord with the record herein, as evidenced by the Opinion filed August 7, 1950 (C. T. 37-126), and the Findings of Fact filed October 2, 1950. (C. T. 139-142.)

The errors complained of may be briefly summarized as follows:

a. Neither the Referee nor the District Court had jurisdiction to enjoin the enforcement of a valid State taxing statute;

b. The Findings (C. T. 139-140) are not supported by the record as more fully set forth in the accompanying brief;

c. The District Judge erroneously construed the California Sales and Use Tax Law;

d. The District Court Judge erroneously concluded that the trustee had no plain, speedy or efficient remedy in the courts of the State of California to dispute the legality and/or validity of the tax assessed against him under

the California Sales and Use Tax Law with respect to liquidation sales made by him;

e. The District Judge erroneously concluded that the California Sales and Use Tax Law does not apply to liquidation sales made by a trustee in bankruptcy even if the California Sales and Use Tax Law is applicable to trustees in bankruptcy.

* * *

Wherefore, your petitioner prays for leave to take an appeal from the said Order entered by the Honorable Jacob Weinberger, Judge of the United States District Court for the Southern District of California, Central Division, on October 5, 1950.

CALIFORNIA STATE BOARD
OF EQUALIZATION,
FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,
Deputy Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for California
State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 1, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, California State Board of Equalization, intends to rely on appeal on the following points:

1. The proceedings below amounted to a suit against the State of California without its consent and in violation of the constitutional principle barring such suits;

2. Neither the Referee, who issued the Order to Show Cause commencing the proceedings resulting in the Order appealed from, nor the District Court Judge who made said Order had jurisdiction to enjoin a State taxing agency, the appellant herein, from enforcing a valid State taxing statute against respondent;

3. The Findings made by the District Judge are not supported by the record;

4. The District Judge erroneously construed the California Sales and Use Tax Law;

5. The District Judge erroneously concluded and held that appellee had no plain, speedy or efficient remedy in the court in the State of California to dispute the legality and/or validity of any tax assessed against him under the California Sales and Use Tax Law with respect to sales of tangible personal property made by him in liquidation of the within bankrupt estate;

6. The District Judge erroneously concluded and held that the California Sales and Use Tax Law does not purport to apply to a trustee in bankruptcy making sales of tangible personal property in liquidation of a bankrupt estate;

7. The District Judge erroneously concluded and held that, even if the California Sales and Use Tax Law does purport to apply to a trustee in bankruptcy making sales of tangible personal property in liquidation of a bankrupt estate, the trustee is nevertheless not subject to the California Sales and Use Tax Law by virtue of his status as an officer of the Bankruptcy Court;

8. The action of the District Judge in approving the Order of the Referee enjoining appellant from enforcing the provisions of the California Sales and Use Tax Law against appellee was erroneous and contrary to law;

9. The Decision and Order of the District Judge are predicated upon a factual situation differing substantially from the facts established by the record herein. On the facts as established by the record, appellee was clearly subject to all valid State taxing statutes, including the California Sales and Use Tax Law.

Dated: November 29, 1950.

FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,
Deputy Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 1, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, California State Board of Equalization, hereby designates all the documents (photostated documents certified by the Clerk of the District Court, and Reporter's Transcript) heretofore transmitted to this Court with the Petition for allowance of the within appeal as material to the consideration of said appeal, and hereby requests that said documents comprising the entire record of all the proceedings herein be printed as such.

Dated: November 29, 1950.

FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,
Deputy Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.
Attorneys for California State
Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 1, 1950.